

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA | : |                 |
|                          | : |                 |
| - v. -                   | : | 17 Cr. 58 (KMK) |
|                          | : |                 |
| RICHARD BREGA,           | : |                 |
|                          | : |                 |
| Defendant.               | : |                 |
| -----                    | X |                 |

**GOVERNMENT’S SENTENCING MEMORANDUM**

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A. The next—the next day, I received an email from the gentleman who was the supervisor at Southern Westchester with pictures of the condition of the buses that they had started to work on.

Q. And what did you do after you saw that?

A. The first thing I did was swear, because the condition—what I was seeing in those pictures basically made me sick to my stomach.

\* \* \*

A. I saw brakes that were metal on metal where the brake pads had worn down to the point where there was no brake pad. And that was rubbing against those rotors. I saw a tremendous amount of rust on the underside of the carriage of those buses. There was issues with ball joints. There was issues with clamps that appeared to have been installed incorrectly. And I know that there was a window in one of the buses and it appeared that the window, a piece of glass, had been installed backwards.

Q. What did you do when you saw the condition of the buses?

A. Well, the first thing, I knew that I was going to have to start replacing those buses.

\* \* \*

But when I saw those buses and I saw the amount of rust and wear, it became very clear to me that I was going to have to start replacing those vehicles, that I could not, in good conscience, put children in those kind of vehicles and expect that they're going to be safely transported.

-David Gleason (Tr. 84–86)

Richard Brega was a businessman. However, he was not just any businessman. He profited off of the public trust. He maintained vehicles for government and non-profit entities, specializing in ensuring that vehicles were safe for the most vulnerable members of our society, including special-needs schoolchildren. But, ultimately, his goal was not the safety of his charges, nor was it the proper maintenance of buses, vans, and cars, nor even simply the success of a legitimate

business. Rather, his goal was simple: to make money, by whatever means necessary. He cheated his clients, nickel-and-diming them every chance he could, irrespective of the propriety of his upcharges. He catered fulsomely to government officials, making sure that they would enter into contracts with him not because he provided a good service at the right price, but because they were chummy with him and he gave them good food, good drink, and good camaraderie. And, ultimately, he bribed at least one public official in order to be able to bill tens of thousands of dollars for maintaining school buses for special-needs children even as he did not do so, sitting idly by, counting his money as the buses deteriorated, putting those children at risk.

Brega did not see the light when he learned that the government was investigating his fraud on Rockland BOCES. Rather, he came up with a scheme to try to cover up his corrupt relationship with Rockland BOCES' director of transportation. Brega did not see the light when he was charged by a grand jury and presented with evidence of his crimes. Rather, he put the Government to its burden at trial, defending himself vigorously, as was his right. Brega did not see the light when mountains of evidence of his guilt were placed before this Court and a jury. Rather, he tried again to get out from under his past by calling an employee to lie to the Court and the jury, falsely claiming that he saw Rockland BOCES' buses at Brega's maintenance shop when, in fact, they were not. Instead, Brega only "saw the light" when it benefited him: after he was convicted and had nowhere else to turn, Brega pivoted and admitted to this Court that he did commit the crimes of conviction (but no more than the crimes of conviction) in an effort to receive leniency in his sentence.

The Government respectfully submits this memorandum in connection with the sentencing of Richard Brega, which is scheduled to take place on December 10, 2018, at 2:00 p.m. As set forth in this memorandum, the applicable Sentencing Guidelines range is 121 to 151 months'

imprisonment. That range reflects not only Brega's criminal actions—which put emotionally, intellectually, and physically disabled children at risk for the sole purpose of improving Brega's bottom line—but also his decision to obstruct justice, both by attempting to cover up his crimes by entering into a new corrupt bargain with his co-conspirator, William Popkave, to conceal Brega's bribes of Popkave, and by eliciting blatantly perjured testimony during the trial. For the reasons that follow, the Court should sentence Brega to a very significant sentence of imprisonment. Such a sentence would be sufficient, but not greater than necessary, to account for the factors set forth at 18 U.S.C. § 3553(a).

## **I. The Offense Conduct**

### **A. Summary**

As was demonstrated well beyond a reasonable doubt at trial, Brega—the owner of the largest bus-maintenance company in Rockland County—engaged in a pattern of corruption, providing free car maintenance to public officials in Rockland County, looking for special favor for his company. One of those officials was William “Billy” Popkave,<sup>1</sup> who was the director of transportation at Rockland BOCES,<sup>2</sup> a non-profit entity that is, effectively, an administrative school district. As such, Popkave managed Rockland BOCES's fleet of school buses, many of which were specially outfitted for special-needs students. Brega and Popkave entered into a corrupt bargain: Brega would continue not to seek payment from Popkave for the tens of thousands of dollars' worth of work that Brega did on cars belonging to Popkave, Popkave's family, and Popkave's friends; in return, Popkave would send Brega lists of Rockland BOCES buses that were

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<sup>1</sup> Popkave pleaded guilty to the same five charges with which Brega was charged pursuant to a cooperation agreement, and testified at Brega's trial via video-taped deposition. Popkave has yet to be sentenced.

<sup>2</sup> A full description of Rockland BOCES can be found at <https://www.rocklandboces.org/>.

due for maintenance—though not send the buses themselves to Brega—Brega would generate invoices and paperwork as if he had maintained the buses, even though he had not, and Popkave would approve payment of those invoices.

The scheme worked for years, netting Brega around \$100,000. However, at one point, Rockland BOCES moved its maintenance contract away from Brega and to Southern Westchester BOCES, which had its own maintenance shop. The chief mechanic at Southern Westchester BOCES was appalled: Rockland BOCES' buses were in a state of utter disrepair. As a result, Rockland BOCES had to pay tens of thousands of dollars to repair the buses, tens of thousands of dollars to rent buses while its fleet was being repaired, and, ultimately, millions of dollars to buy a new bus fleet.

Later, when Brega learned of a federal investigation, he contacted Popkave and told him that he needed to clear up Popkave's open account at Brega, which would provide evidence of the corrupt bargain. Accordingly, Brega entered into a transaction with Popkave, whereby Brega would buy Popkave's mechanic's tools for \$30,000, and Popkave would immediately pay that money to Brega, as if he was not getting work done for free. Popkave then used his own money to finish paying down his account. Popkave understood that Brega would eventually make him whole: that is, the transaction was a sham transaction.<sup>3</sup>

## **B. Detailed Explanation**

### **1. Richard Brega and the Brega Enterprises**

In or about 1997, Brega started Brega D.O.T. Maintenance Corp. ("Brega DOT"), a fleet maintenance repair shop, in Rockland County, New York. In or about 2002, Brega established

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<sup>3</sup> Even if the transaction were not a sham—that is, if Popkave were not going to be made whole—the intent of the transaction was to mask the corrupt bargain, and it would still be done to obstruct the investigation.

Brega Transport Corp. (“Brega Transport”), a public transportation company, in Rockland County, New York. In or about 2009, Brega founded RTB Properties, which owned and operated a public transportation and maintenance facility in Valley Cottage, Rockland County, New York. In or about 2015, Brega founded Brega Commercial Collision (“BCC”), a heavy-duty auto body service in Rockland County, New York. Brega owned and controlled Brega DOT, Brega Transport, RTB Properties, and BCC (together, the “Brega Enterprises”). Brega primarily serviced government and not-for-profit entities. (Tr. 438).

## **2. Rockland BOCES**

In or about 1948, the New York State Legislature created the Boards of Cooperative Educational Services, or “BOCES,” to provide school districts with a program of shared educational services. BOCES allow multiple school districts to save money by pooling resources and sharing costs. BOCES are governed by a Board of Education, made up of representatives from component districts. There are currently 37 BOCES in New York State.

Rockland BOCES serves eight component school districts, each of which is in Rockland County, New York. According to the Rockland BOCES website, “Rockland BOCES delivers educational programs for students with special needs, teens interested in career and technical training, adult learners preparing for new job opportunities and educators seeking to upgrade their professional skills.” Among the services that Rockland BOCES offers to its students is a fleet of buses, some of which are specially equipped for students with physical disabilities.

In most years, Rockland BOCES receives between about \$800,000 and \$1.2 million in federal funding. There have been years, however, in which Rockland BOCES received far more federal funding; for example, in 2016, Rockland BOCES received a \$4 million grant from the federal Substance Abuse and Mental Health Services Administration.

**a. William Popkave**

William Popkave was a local Rockland County car mechanic who operated a gas station/car-repair shop. He eventually left that shop and became the transportation supervisor for Rockland BOCES. In that role, Popkave oversaw the dispatch and maintenance of Rockland BOCES' entire bus fleet. Initially, Rockland BOCES performed maintenance on its own fleet, with a staff of car mechanics who worked for Popkave. Over time, however, Popkave and Rockland BOCES decided that Rockland BOCES would be better served by outsourcing most of its maintenance and repair work.

**b. Brega's Contracts With Rockland County and, by Extension, Rockland BOCES**

Brega's success relied, in part, on various county contracts. Among other things, in 2008, Rockland County awarded Brega DOT a bus fleet maintenance bid (the "2008 Vehicle Maintenance Agreement") whereby Brega DOT would provide maintenance and service for Rockland County's bus fleet. As part of the 2008 Vehicle Maintenance Agreement, certain other entities, such as Rockland BOCES, were permitted to use Brega DOT for their own bus-fleet maintenance and service as if they were parties to the 2008 Vehicle Maintenance Agreement. The 2008 Vehicle Maintenance Agreement had a one-year term, but gave Rockland County the option to extend for up to four additional one-year terms. The 2008 Vehicle Maintenance Agreement was extended by one year in each of 2009, 2010, 2011, and 2012, and by three months in 2013.

In or about 2013, Rockland County awarded Brega DOT a new bus fleet maintenance bid (the "2013 Vehicle Maintenance Agreement") whereby Brega DOT would provide maintenance and service for Rockland County's bus fleet. As part of the 2013 Vehicle Maintenance Agreement, certain other entities, such as Rockland BOCES, were permitted to use Brega DOT for their own bus-fleet maintenance and service as if they were parties to the 2013

Vehicle Maintenance Agreement. The 2008 Vehicle Maintenance Agreement had a one-year term, but gave Rockland County the option to extend for up to four additional one-year terms. The 2013 Vehicle Maintenance Agreement was extended by one year in 2014, ultimately expiring on June 30, 2015.

The service of Rockland BOCES' buses by Brega DOT included regular preventative maintenance ("Preventative Maintenance"). To perform Preventative Maintenance on a Rockland BOCES bus, Brega DOT was supposed to, among other things, receive the bus at Brega DOT's facility, inspect the bus, and, ordinarily, drive the bus. To obtain payment for Preventative Maintenance, Brega DOT created invoices documenting the work done, provided the invoices to Rockland BOCES, and, once Popkave approved the bill, received payment from Rockland BOCES.

### **3. The Fraud and Bribery Scheme**

Brega conspired to and did steal money from Rockland BOCES by, among other things, billing Rockland BOCES for vehicle repair services that, as Brega well knew, were never performed. To do so, Brega and employees operating at his direction generated fake invoices in order to give the false appearance that his company had performed regular Preventative Maintenance on certain buses, when in fact those buses were not even brought to Brega DOT. To create the fake invoices, and to obtain payment from Rockland BOCES for work that was never performed, Brega bribed Popkave with tens of thousands of dollars-worth of free personal vehicle repairs. Popkave, in turn, emailed Brega lists of buses and their mileages for purposes of creating fake invoices, and thereafter approved payment of the fake invoices at Rockland BOCES.

Brega began laying the groundwork early in his relationship with Popkave. Brega would host and cater get-togethers in his office for some friends and associates, as well as local

politicians and Popkave. (Popkave Tr. 37–41).<sup>4</sup> Popkave “felt good being a part of the in crowd.” (Popkave Tr. 41). After Rockland BOCES began to use Brega DOT to perform maintenance on its bus fleets, Popkave began bringing his personal cars and trucks to Brega DOT for individual maintenance. (Popkave Tr. 42–43). One of the reasons he did so was because Vincent Marzella, Sr.—a local government official—explained to Popkave that if Popkave “helped Richard, he would help [Popkave].” (Popkave Tr. 42–43). Marzella was right. Brega DOT performed services on Popkave’s cars, and then gave Popkave the keys to those cars without making him pay for the services. (Popkave Tr. 45). While Brega DOT sent Popkave bills, Popkave did not feel obligated to pay them; rather, he threw them away. (Popkave Tr. 46–47).<sup>5</sup> Popkave saw a good thing and began bringing cars belonging to his friends and family for service on his account. (Popkave Tr. 47–49). Brega DOT continued working on Popkave’s cars, Popkave’s friends’ cars, and Popkave’s family’s cars, even though Popkave was racking up tens of thousands of dollars in unpaid bills, never leaning on Popkave to pay his bills or sending Popkave’s account to a collection agency. (Popkave Tr. 48–51). As Popkave explained:

Q. Why did you bring the vehicles of your family and friends to Brega DOT for service?

A. To get the work done that was needed.

Q. Why did you bring them there to Brega DOT?

A. I was happy with what was going on?

Q. What do you mean?

A. I was getting work done. And they were providing good work and I wasn’t paying.

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<sup>4</sup> “Popkave Tr.” refers to the transcript of Popkave’s deposition, which was admitted at trial.

<sup>5</sup> Popkave explained that, at the very beginning, he paid “a couple small bills,” but that quickly stopped. (Popkave Tr. 46).

Q. Was it your understanding you wouldn't have to pay for those vehicles as well, the family and friends?

A. Yes, I had my own account

\* \* \*

Q. Why didn't you pay for the work being done by Brega DOT on your personal vehicles?

A. I didn't think I had to.

\* \* \*

Q. When you brought in your personal vehicles for service at Brega DOT and continued to get your car serviced and returned to you without paying for it, what was your understanding about whether you had to pay the bill?

A. I didn't think I had to.

Q. So far as you understood it, you were getting free vehicle service from Brega DOT?

A. Yes.

(Popkave Tr. 49, 51–52).

Eventually, Brega saw his opportunity to capitalize on his investment in Popkave. Popkave had not been sending Rockland BOCES buses to Brega DOT for preventative maintenance services (also known as “PM services”), and this reduced Brega DOT’s revenue. So Brega approached Popkave with a simple, utterly fraudulent, scheme: Popkave did not need to send the buses to Brega DOT; rather, he just needed to send information to Brega DOT and Brega would invoice Popkave as if he had performed preventative maintenance services on the buses—which he had not—and Popkave would cause Rockland BOCES to pay the bill. This way, Brega would get paid and Popkave would get the paperwork to show that the buses were being maintained. Rockland BOCES, by contrast, would be paying for work that was not done, and the Rockland BOCES children would ride buses that were not being maintained. Brega made clear what had

always been implicit: Popkave's free service was a bribe and Popkave's participation in the fraud was the quo to the quid of free services. As Popkave explained:

Q. Can you tell us generally, and in sum and substance, what Richard Brega said to you about PM services on Boces busses during discussions with you?

A. He needed to get the PMs over there, you know. He needed to get the PM services over. There was discussions, and I don't remember word-for-word, that he needed to show productivity every month. Also, for—for either what was owed to him or what he had billed out, he needed to show a monthly nut.<sup>[6]</sup> And so this is how that all came about between us to make to bring the busses over.

Q. What do you mean "this is how that all came about between us"?

A. To—with the PM services.

Q. When he referred to his monthly nut or something like that, what did you understand Richard Brega to be talking about?

A. I guess—once again, I don't know numbers, I don't know I understood it to mean that he had to meet some goal monthly.

Q. What kind of goal?

A. Financially a goal.

Q. What did that have to do, if anything, with the PM services on Boces busses?

A. Well, once I sent the PMs over, it was to my understanding, which never happened, but I was to get some credits toward my bill, my own bill also. But that never happened. So I didn't put pressure on him, he didn't put pressure on me.

Q. You referred a couple of times to sending over PMs or something like that in your answer just now.

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<sup>6</sup> Brandon Sweeting explained that Brega needed to make at least \$200,000 a month in gross parts and labor sales. (Tr. 260).

A. Yes. PM information.

Q. Did you have discussions with Richard Brega that lead to you sending over to him information to do with PMs?

A. Yes.

Q. What was the substance of those discussions?

A. I don't recall. It just had to do with that we discussed the monthly nut, and also I would be able to get a PM slip for my book to show I'm in compliance with mileage and date.

Q. And during those discussions, what was said in substance about how you would get such a slip for PM service?

A. I would send over a lot of emails with the bus number, the date it had to be done by, and the mileage off the bus to put onto the repair order, invoice.

Q. And what would you receive?

A. I would receive a invoice that the work got done and a PM sheet for our PM logbook.

Q. What was the purpose of you sending that information and Brega DOT sending that invoice?

A. It was just a cover up for getting the PMs done on time and to be—and the billing.

Q. And the arrangement between yourself and Richard Brega, that you're describing discussions about, did that include sending the bus to Brega DOT for service?

A. No.

Q. During those discussions, about arranging for bills on PM services when the bus didn't go there to have it done, did Richard Brega make any reference to your unpaid bill on your personal vehicles?

A. He made references.

Q. What, in substance, did he say about that?

A. Kept me up-to-date with the total, where it was, where I stood.

Q. Can you describe, as best as you can recall, what sort of references Richard Brega made to your unpaid bill during discussions you had with him about PM services on the Boces vehicles?

A. I'm sorry, say that—rephrase that again.

Q. Sure. Can you describe for us, as best as you can recall, what, in substance, Richard Brega said to you when he made reference to your own personal bill, which was not paid for your personal vehicles, during discussions about PM services on Boces vehicles?

A. That I needed to get some PM—the PM information over there to his place. I had to get the information to him.

Q. And what, if anything, did that have to do with your own personal vehicles and your unpaid bill?

A. I was supposed to get credits off of my bill not knowing, \$10 or \$20. I never knew how much or whatever. I was supposed to get a reduced statement or, you know, adjustments on my statement. I'm not sure what to say.

Q. And are you saying the discussion was not more specific about how much your bill would be adjusted?

A. No, it never was a specific to that.

Q. Is it fair to say the discussions you're describing were more general than that?

A. Yes.

Q. Were you paying your bill?

A. No.

Q. And during these discussions were you told in substance, or in any way, you have to pay your bill?

A. No.

(Popkave Tr. 54–59).

Brega's plan worked. Popkave had his employees perform a perfunctory check of all of the fleet's buses' fluids every other Saturday, during which the employees wrote down the mileage of

those buses in logs. (GX 222). Popkave used the information from those Saturday logs to e-mail Brega lists of buses that were due for preventative maintenance and their mileages. Brega then forwarded those e-mails—or the contents of those e-mails—to his service writers Brandon Sweeting and, later, Jill Ann Lepore, who created fake work orders and PM sheets (which also served as invoices) at Brega's direction, using the agreed-upon flat rates for preventative maintenance inspections.<sup>7</sup> (Tr. 264–65, 397–98). Those buses were not actually brought into Brega DOT and were not actually inspected.<sup>8</sup>

The fake invoices were created in batches:

- On December 20, 2012, Brega created \$2,520 worth of fake invoices
- On December 21, 2012, Brega created \$2,520 worth of fake invoices
- On December 31, 2012, Brega created \$2,520 worth of fake invoices
- On February 11, 2013, Brega created \$5,040 worth of fake invoices
- On March 28, 2013, Brega created \$5,040 worth of fake invoices
- On May 4, 2013, Brega created \$5,040 worth of fake invoices
- On May 15, 2013, Brega created \$2,520 worth of fake invoices
- On June 15, 2013, Brega created \$4,536 worth of fake invoices
- On October 24, 2013, Brega created \$7,758.30 worth of fake invoices
- On December 26, 2013, Brega created \$8,158.30 worth of fake invoices
- On January 29, 2014, Brega created \$7,758.30 worth of fake invoices
- On February 25, 2014, Brega created \$8,158.30 worth of fake invoices

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<sup>7</sup> Those rates increased over time.

<sup>8</sup> Indeed, when buses were brought in, there were always problems that needed to be fixed. (Tr. 90, 256). Whatever problems there may have been with the buses for which Brega generated false invoices were not repaired.

- On April 30, 2014, Brega created \$7,958.30 worth of fake invoices
- On July 24, 2014, Brega created \$10,701.62 worth of fake invoices

Brega provided Popkave with the false invoices. Popkave then approved those false invoices, which he forwarded to Rockland BOCES' accounts payable department. Rockland BOCES, relying on Popkave's approval, paid Brega DOT, mailing the checks. The fake invoices detailed above, all of which were paid in full by Rockland BOCES for services that were never performed, totaled \$80,229.12.<sup>9</sup>

When the buses were due for state inspection, Popkave would actually bring the buses into Brega DOT, where Brega DOT would sufficiently service the buses to pass inspection. Because the buses had not been properly maintained, the cost of these pre-inspection maintenances were much higher than they should have been.

Brega also forgave Popkave enormous sums of money that Popkave owed to Brega; this was Brega's bribe of Popkave. (GX 508). On January 31, 2013, Brega forgave Popkave \$47,318.81.<sup>10</sup> On December 10, 2014, Brega forgave Popkave \$30,000.<sup>11</sup> (GX 508). On January 6, 2015, Brega forgave Popkave \$9,608.76.<sup>12</sup> (GX 508). On February 13, 2015, Brega forgave Popkave \$76.87. (GX 508). On May 4, 2015, Brega forgave Popkave \$216.91. (GX 508). In total, this means that Brega provided Popkave with \$87,221.35 worth of free vehicle services.

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<sup>9</sup> There may have been additional fake invoices; these are the ones we have identified thus far.

<sup>10</sup> On March 7, 2013, Brega reversed this twice; effectively adjusting his books to account for that forgiveness transaction-by-transaction.

<sup>11</sup> As detailed below, this was part of the obstruction of justice; Brega created a paper transaction to allow Popkave to "pay" him \$30,000.

<sup>12</sup> As detailed below, this was part of the obstruction of justice; Brega created a paper transaction to allow Popkave to "pay" him \$9,608.76.

#### 4. Obstruction of Justice

In late 2014, Brega became very concerned that investigators were closing in on him. (GX 715). While Popkave was at Brega's offices, Brega took Popkave into the parking lot for a walk-and-talk. (Popkave Tr. 63–65).<sup>13</sup> Brega explained that he “was concerned that he was going to be investigated for his business actions.” (Popkave Tr. 67). Accordingly, Popkave's open bill—that is, the evidence of Brega's bribery of Popkave—“needed to be cleared up.” (Popkave Tr. 67). “He said that myself and others, that he had money out there that he needed to clear up. What we call on-the-street-money, you know, or and so mine was an open account, as were others that he was collecting money on, to clear up all his open accounts.” (Popkave Tr. 67).

In other words, Popkave needed to repay the money he owed Brega DOT in order to conceal the fact that Brega was providing Popkave with free services. Popkave knew that he owed Brega around \$40,000. (Popkave Tr. 68). Popkave only had around \$10,000 available, so Brega asked Popkave if Popkave had anything of value that Brega could purchase in order to provide Popkave with money to pay down Popkave's account balance; Popkave had a motorcycle that he did not want to give up and mechanic's tools worth around \$40,000. (Popkave Tr. 68–73). Brega and Popkave ultimately agreed that Brega would “purchase” of Popkave's mechanic's tools for the \$30,000 balance of the account.<sup>14</sup> (Popkave Tr. 68, 70–71). Popkave would take that money, turn around, and pay it right back to Brega, only, on paper, it would be to pay off his bill. (Popkave Tr. 71). This would all be a sham transaction, as Brega agreed to pay Popkave back over time for

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<sup>13</sup> In a text message to Popkave, during which Brega spoke in code because he believed that “my phone is being monitored,” Brega explained that his concerns were about “[w]hat we talked about walking the parking lot a couple of weeks ago.” (GX 715).

<sup>14</sup> Needless to say, Brega, who already owned a large vehicle maintenance and repair facility, did not need Popkave's tools.

the money Popkave would “receive” for the tools and then hand back to Brega. (Popkave Tr. 68, 73).

Popkave did as asked. Brega then gave Popkave a \$30,000 check for the tools, and Popkave turned around and paid Brega the account balance, and then nearly \$10,000 additional cash. (Popkave Tr. 73–80; GX 10-13). In particular, on December 3, 2014, a \$30,000 cashier’s check was issued from the account belonging to one of the Brega Enterprises at the Greater Hudson Bank, NA to Popkave with the memo reading “TOOLS FOR NEW BUSINESS.” (GX 10). On December 8, 2014, Popkave deposited the \$30,000 in his personal bank account. (GX 11). Two days later, on December 10, 2014, Popkave wrote a personal check to Brega DOT for \$30,000. (GX 12). On January 2, 2015, Popkave wrote a personal check to Brega DOT for \$9,608.26. (GX 13). Brega cleared Popkave’s bill. (Tr. 541–42; GX 508). Popkave understood that Brega would eventually reimburse Popkave for the money that Popkave had just paid Brega. (Popkave Tr. 68, 73).

## **5. The Aftermath**

In October 2015, Rockland BOCES decided to leave Brega after learning that it was paying exorbitant fees for preventative maintenances. (Tr. 79–82). Rockland BOCES decided to bring its buses instead to Southern Westchester BOCES, which would charge around \$225 for a preventative maintenance (instead of the \$835 charged by Brega DOT). (Tr. 82). Once Rockland BOCES began to send its buses to Southern Westchester BOCES, it discovered something that made a Rockland BOCES, David Gleason, executive “sick to [his] stomach.” (Tr. 84). Mr. Gleason explained:

- A. I saw brakes that were metal on metal where the brake pads had worn down to the point where there was no brake pad. And that was rubbing against those rotors. I saw a tremendous amount of rust on the underside of the carriage of those buses. There was issues with ball joints. There was issues with clamps that appeared to have been installed incorrectly. And I know that there was a window in one of

the buses and it appeared that the window, a piece of glass, had been installed backwards.

Q. What did you do when you saw the condition of the buses?

A. Well, the first thing, I knew that I was going to have to start replacing those buses.

Part of—and parts of the—and you didn't ask me this, but I live Upstate where they get a lot more snow and salt Upstate. And Upstate, with the buses, you have to be very mindful of the amount of surface rust and rust on the undercarriage of the vehicle, because they won't pass a DOT inspection. A DOT inspector won't pass them if they have a tremendous amount of rust on the undercarriage of the buses. So Upstate, a bus won't last as long as it will down here, because they use a lot more salt.

But when I saw those buses and I saw the amount of rust and wear, it became very clear to me that I was going to have to start replacing those vehicles, that I could not, in good conscience, put children in those kind of vehicles and expect that they're going to be safely transported.

Q. So what did you do to transport children at that time?

A. Initially, we started obtaining new buses from the vendors as quickly as we could. But we also rented buses from Southern Westchester. He had a few buses so that we could send vehicles over for the maintenance for the major repairs to be done on those vehicles. He would send us back some of his spares so that I could continue to transport kids while my buses were being fixed.

(Tr. 85–86; *see also* GX 50-89, 50-101, 50-98, 50-104, 50-105, 50-109 and 50-48 (photographs of selected deteriorating buses). The supervisor and Southern Westchester BOCES recognized that the buses were not “in a condition that they could be driven when they were brought to” him. (Tr. 663).

At trial, Mr. Gleason estimated that Rockland BOCES spent approximately \$50,000 on bus rentals during this time, and over a million dollars ultimately to replace the fleet. (Tr. 86). Mr. Gleason has since run the precise numbers—including figuring out what amounts were spent on

renting buses versus repairing buses, and determined that Rockland BOCES spent: \$105,136.21 to repair the fleet to keep the buses on the road and passing the DOT inspections from November 2015 through February 2016; and \$21,150 to rent buses while the fleet was being repaired. Rockland BOCES ultimately purchased new buses, reducing its costs by the trade-in value of the old buses, costing a total of \$2,233,284.87, and received \$6,527.50 for buses that it auctioned off after being unable to trade them in, for a net fleet replacement cost of \$2,226,757.37.

## **II. Procedural Background**

### **A. Indictment 17 Cr. 58 (KMK)**

On or about January 25, 2017, a grand jury in this District returned indictment 17 Cr. 58 (KMK), which charged Richard Brega in five counts:

- Count One charged Brega with participating in a conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1341, which conspiracy violated 18 U.S.C. § 371.
- Count Two charged Brega with committing mail fraud, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1341, 1346, and 2.
- Count Three charged Brega with bribing a public official, and aiding and abetting the same, in violation of 18 U.S.C. §§ 666(a)(2) and 2.
- Count Four charged Brega with aiding and abetting theft from a program receiving federal funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2.
- Count Five charged Brega with obstructing justice, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1512(b)(3) & (c)(2) and 2.

## **B. Brega's trial**

On April 17, 2018, jury selection in a trial on the Indictment began. On May 2, 2018, the jury delivered a partial verdict, finding Brega guilty on Counts Two,<sup>15</sup> Three,<sup>16</sup> and Four. (Tr. 1177-78). On May 3, 2018, the jury found Brega not guilty on Count Five. (Tr. 1214). On May 4, 2018, the jury indicated that it was deadlocked, and the Court—with the consent of all parties—declared a mistrial with respect to Count One. (Tr. 1220-22).

## **C. The Presentence Investigation Report**

In its Presentence Report, the Probation Office calculates Brega's adjusted offense level under the United States Sentencing Guidelines as 29, based on calculations that mirror the Government's calculations, below, *except that*: (1) the Probation Office does not include any victim-related enhancements (PSR ¶ 45); and (2) the Probation Office “defers to the Court regarding” adjustments for obstruction of justice (PSR ¶¶ 47, 55). The Probation Office finds that Brega has one criminal history point—related to his plea of guilty to falsifying business records, for which he has yet to be sentenced<sup>17</sup>—and is therefore in criminal history category I. (PSR ¶¶ 64–66). Based on an offense level of 29 and a criminal history category of I, the Probation Office calculates Brega's Guidelines range as 87 to 108 months' imprisonment. (PSR ¶ 111).

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<sup>15</sup> The Court had asked the jury to determine whether Brega committed one or both of “money and property” mail fraud and “honest services” mail fraud. The jury found that Brega committed both. (Tr. 1177).

<sup>16</sup> The Court had asked the jury to determine whether Brega committed one or both of “bribery” and “illegal gratuity” bribery. The jury found that Brega committed both. (Tr. 1178).

<sup>17</sup> The Probation Office indicates that Brega was scheduled to be sentenced in state court on November 20, 2018. The Government understands that Brega's state sentencing has been adjourned to December 11, 2018.

The Probation Office recommends a sentence of 36 months' imprisonment on each count to run concurrently, to be followed by one year of supervised release on each count to run concurrently. (PSR at 29). The Probation Office also recommends that Brega be ordered to pay restitution of \$206,515.33 to Rockland BOCES, and also to pay a mandatory \$300 special assessment. (PSR at 29).

### **III. Argument**

#### **A. The Governing Legal Framework**

The Guidelines still provide strong guidance to the Court in light of *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Although *Booker* held that the Guidelines are no longer mandatory, it held also that the Guidelines remain in place and that district courts must “consult” the Guidelines and “take them into account” when sentencing. 543 U.S. at 264. As the Supreme Court has stated, “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range”: that “should be the starting point and the initial benchmark.” *Gall v. United States*, 55 U.S. 38, 49 (2007). The Guidelines range is thus “the lodestar” that “‘anchor[s]’” the district court’s discretion. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-46 (2016) (quoting *Peugh v. United States*, 133 S. Ct. 2072, 2087 (2013)).

After that calculation, however, a sentencing judge must consider seven factors outlined in Title 18, United States Code, Section 3553(a): “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1); the four legitimate purposes of sentencing, *see* 18 U.S.C. § 3553(a)(2); “the kinds of sentences available,” 18 U.S.C. § 3553(a)(3); the Guidelines range itself, *see* 18 U.S.C. § 3553(a)(4); any relevant policy statement by the Sentencing Commission, *see* 18 U.S.C. § 3553(a)(5); “the need to avoid unwarranted

sentence disparities among defendants,” 18 U.S.C. § 3553(a)(6);<sup>18</sup> and “the need to provide restitution to any victims,” *id.* § 3553(a)(7). In determining the appropriate sentence, the statute directs judges to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing, which are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

Courts may not presume that the appropriate sentence necessarily lies within Guidelines range, but “the fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Gall v. United States*, 552 U.S. at 50 n.6. Their relevance throughout the sentencing process stems in part from the fact that, while the Guidelines are advisory, “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives,” *Rita v. United States*, 551 U.S.

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<sup>18</sup> Among the factors a sentencing court must consider in imposing sentence is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). Congress adopted Section 3553(a)(6) “to eliminate unwarranted disparities nationwide.” *United States v. Williams*, 524 F.3d 209, 215 (2d Cir. 2008). Because Section 3553(a)(6) was intended to address national disparities, “a district court may—but is not required to—consider sentencing disparity among co-defendants under 18 U.S.C. § 3553(a)(6).” *United States v. Johnson*, 567 F.3d 40, 54 (2d Cir. 2009) (citing *United States v. Frias*, 521 F.3d 229, 236 & n.8 (2d Cir. 2008)). By this same logic, this Court may—but is not required to—consider sentencing disparities with other defendants in this District.

338, 348 (2007), and the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” *Gall*, 552 U.S. at 46; *see also Rita v. United States*, 551 U.S. at 349. To the extent a sentencing court varies from the Guidelines sentence, “[it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Gall*, 552 U.S. at 50.

**B. The Applicable Guidelines Range is 121 to 151 Months’ Imprisonment**

The parties and the Probation Office agree that Brega has one criminal history point and accordingly is in criminal history category I. As set forth below, the applicable Guidelines offense level is 32:

1. The Guidelines provisions in effect as of November 1, 2018, apply in this case. *See* U.S.S.G. § 1B1.1(a).
2. Counts Two<sup>19</sup> and Four<sup>20</sup> are grouped together because: (a) they involve the same victim and, at least in part, the same act or transaction, *see* U.S.S.G. § 3D1.2(a); (b) they involve the same victim and, at least in part, two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, *see* U.S.S.G. § 3D1.2(b); and the offense level is determined largely on the basis of the total amount of harm or loss ... or some other measure of aggregate harm, and the offense behavior is ongoing and continuous in nature and the offense guideline is written to cover such behavior, and U.S.S.G. § 2B1.1 is enumerated as a guideline to be grouped, *see* U.S.S.G. § 3D1.2(d).
3. Count Three<sup>21</sup> is *not* grouped with Counts Two and Four, even though there is a cross-reference to another offense guideline, pursuant to U.S.S.G. § 3D1.2, comment. (n.5).<sup>22</sup>

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<sup>19</sup> Mail fraud, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1341, 1346, and 2.

<sup>20</sup> Aiding and abetting theft from a program receiving federal funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2.

<sup>21</sup> Bribing a public official, and aiding and abetting the same, in violation of 18 U.S.C. §§ 666(a)(2) and 2.

<sup>22</sup> The Application Notes to U.S.S.G. § 3D1.2 provide a dispositive example:

4. Accordingly, there are two groups: the “Fraud Group,” which consists of Counts Two and Four; and the “Bribery Group,” which consists of Count Three.
5. **Calculations for the Fraud Group**
  - a. The applicable Guideline section is U.S.S.G. § 2B1.1.
  - b. Because Brega was convicted of an offense that has a statutory maximum term of imprisonment of 20 years or more—18 U.S.C. § 1341—the base offense level is 7, pursuant to U.S.S.G. § 2B1.1(a)(1).
  - c. Because the loss exceeded \$150,000,<sup>23</sup> the offense level is increased by 10, pursuant to U.S.S.G. § 2B1.1(b)(1)(F).
  - d. Because the offense otherwise involved sophisticated means and Brega intentionally engaged in or caused the conduct constituting sophisticated means, the offense level is increased by 2, pursuant to U.S.S.G. § 2B1.1(b)(10)(C).
  - e. Accordingly, the initial offense level for the Fraud Group before application of Chapter Three Enhancements is 19.

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A cross reference to another offense guideline does not constitute “a specific offense characteristic ... or other adjustment” within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference.

U.S.S.G. § 3D1.2, comment. (n.5).

<sup>23</sup> The total loss is \$206,515.33: (1) \$80,229.12 for the false invoices; plus (2) \$21,150.00 for rentals of buses while repairing the buses that Brega failed to maintain properly; plus (3) \$105,136.21 for repairs of buses that Brega failed to maintain properly. It would be appropriate as well to add for the excess costs of repair immediately prior to inspections; however, that would require significant effort to identify, and be very unlikely to increase the loss amount to the next Section 2B1.1 threshold. While it can be argued that the net replacement cost of the buses—\$2,233,284.87—should also factor into loss amount, because Brega’s crimes only resulted in an accelerated need to replace the buses, we think it is better to consider the net replacement cost as a Section 3553(a) factor.

f. **Chapter Three Enhancements**<sup>24</sup>

- i. Because Brega knew or should have known that a victim of the offense was a vulnerable victim—in particular, the mentally, emotionally, and physically disabled Rockland BOCES students—the offense level is increased by 2, pursuant to U.S.S.G. § 3A1.1(b)(1).
- ii. Because U.S.S.G. § 3A1.1(b)(1) applies and the offense involved a large number of vulnerable victims, the offense level is increased by an additional 2 levels, pursuant to U.S.S.G. § 3A1.1(b)(2).
- iii. Because Brega was an organizer, leader, manager, or supervisor in a criminal activity other than described in U.S.S.G. § 3B1.1(a) or (b), the offense level is increased by 2, pursuant to U.S.S.G. § 3B1.1(c).
- iv. Because (1) Brega willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction; and (2) the obstructive conduct related to (A) Brega’s offense of conviction and any relevant conduct; or (B) a closely related offense, the offense level is increased by 2, pursuant to U.S.S.G. § 3C1.1.

g. Accordingly, the offense level for the Fraud Group is 27.

6. **Calculations for the Bribery Group**

- a. The applicable Guideline section is U.S.S.G. § 2C1.1.
- b. Because Brega was not a public official, the base offense level is 12, pursuant to U.S.S.G. § 2C1.1(a)(2).
- c. Because the offense involved more than one bribe or extortion—*i.e.*, Brega permitted Popkave to service multiple cars on multiple occasions without payment—the offense level is increased by 2, pursuant to U.S.S.G. § 2C1.1(b)(1).
- d. Because the value of the payment (\$87,221.35), the benefit received or to be received in return for the payment (\$80,229.12), the value of anything obtained or to be obtained by a public official or others acting with a public official (\$87,221.35), or the loss to the

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<sup>24</sup> The offense level for each Group is “determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three” before grouping the various Groups together. U.S.S.G. § 3D1.3(a).

government from the offense (in excess of \$206,515.33), whichever is greatest, exceeded \$6,500, the offense level is increased by 10, pursuant to U.S.S.G. §§ 2C1.1(b)(2) and 2B1.1(b)(1)(F).

- e. Because the offense involved a public official in a high-level decision-making position—*i.e.*, Popkave had a direct authority to make decisions for, or on behalf of, Rockland BOCES, and had a substantial influence over the decision-making process<sup>25</sup>—the offense level is increased by 4, pursuant to U.S.S.G. § 2C1.1(b)(3).
- f. Accordingly, the initial offense level for Group Two (the Bribery Group) before application of Chapter Three Enhancements is 28.
- g. **Chapter Three Enhancements**
  - i. Because (1) Brega willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction; and (2) the obstructive conduct related to (A) Brega's offense of conviction and any relevant conduct; or (B) a closely related offense, the offense level is increased by 2.
  - h. Accordingly, the offense level for the Bribery Group is 30.

#### 7. **Multiple Count Analysis**

- a. The Group with the highest offense level—the Bribery Group—counts as one Unit, pursuant to U.S.S.G. § 3D1.4(a).
- b. Because the Fraud Group (offense level of 27) is 1–4 levels less serious than the Bribery Group (offense level of 30), the Fraud Group counts as one unit, pursuant to U.S.S.G. § 3D1.4(a).
- c. The combined offense level is determined by taking the offense level applicable to the Bribery Group and increasing that offense level by 2 levels, pursuant to U.S.S.G. § 3D1.4.
- d. Accordingly, the final offense level is 32.

Based on an offense level of 32 and criminal history category of I, the applicable Guidelines range is 121 to 151 months' imprisonment.

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<sup>25</sup> See U.S.S.G. § 2C1.1, comment. (n.4(A)).

The Probation Office’s Guidelines calculation is consistent with the Government’s, except that (1) the Probation Office does not include any victim-related enhancements (PSR ¶ 45); and (2) the Probation Office “defers to the Court regarding” adjustments for obstruction of justice (PSR ¶¶ 47, 55). Accordingly, the Probation Office applies an offense level of 29, which yields an applicable Guidelines range of 87 to 108 months’ imprisonment. (PSR ¶ 50, 82).

Brega challenges (1) the loss amount applicable to the Fraud Group; and (2) the enhancements for (a) Brega’s use of sophisticated means; (b) Brega’s use of separate bribes; (c) Popkave’s position as a high-level official; and (d) Brega’s obstruction of justice. Additionally, Brega does not discuss the applicable victim-related adjustments as the Probation Office did not include them in its calculation. For the following reasons, each enhancement is properly applied here, and the loss amount detailed above is correct.

### **1. Loss Amount**

Brega agrees that the falsified invoices totaled \$80,229.12 and the bribes totaled \$87,221.35. (Brega Sent. Mem. 12). However, Brega argues that he should not be liable for \$105,136.21 that Rockland BOCES paid to repair buses that Brega had failed to maintain as part of his fraud, and an additional \$21,150 that Rockland BOCES paid to rent buses while those repairs took place. (Brega Sent. Mem. 11).<sup>26</sup> Brega is wrong.

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<sup>26</sup> Additionally, Brega argues that he should be credited for: (1) an \$11,905.08 refund for overbilling he provided to Rockland BOCES; (2) \$25,052.98 that Brega alleges Rockland BOCES owes Brega DOT; and (3) approximately \$97,000 in free repairs that Brega alleges he provided to Rockland BOCES. First, each of these numbers is utterly irrelevant. Brega refunded Rockland BOCES only after Brega’s separate overbilling of Rockland BOCES—by charging an extra markup on parts for which it was contractually obligated only to charge a 25% margin—was discovered. (Tr. 84, 231, 319). That illegal markup was not a part of the \$80,229.12 loss figure, and so a refund of that illegal markup should not benefit Brega. Second, Brega simply says that Rockland BOCES owes him money. Even if it is true—and Rockland BOCES explains that its counsel and the Rockland County District Attorney’s Office instructed it not to pay any remaining invoices, or cash the \$11,905.08 refund, for that matter (PSR at 27)—Brega does not even attempt to demonstrate that Rockland BOCES failed to paid Brega for the *fraudulent invoices*. Nor would

Loss amount is not limited to the “fair market value of the property unlawfully taken”: here, the money that Rockland BOCES paid Brega on the basis of the fraudulent invoices. U.S.S.G. § 2B1.1, comment. (n.3(C)(i)). It also, quite sensibly, includes the “cost of repairs to damaged property.” U.S.S.G. § 2B1.1, comment. (n.3(C)(iii)). Accordingly, for example, the Second Circuit found that a district court erred in an environmental fraud case where it failed to consider a victim’s “clean-up costs” where the defendant had falsely claimed to perform a proper asbestos abatement. *United States v. Desnoyers*, 708 F.3d 378, 385–86 (2d Cir. 2013).<sup>27</sup>

Here, the crux of the case was that Brega did not properly maintain Rockland BOCES’ buses, even though he was invoicing Rockland BOCES as if he was properly maintaining them. Rockland BOCES relied on Brega to perform the preventative maintenances. (Tr. 58–59). In October 2015, Rockland BOCES started to send its buses to Southern Westchester BOCES, rather than Brega DOT, for maintenance. David Gleason, of Rockland BOCES, explained what happened next:

Q Did anything happen once you started sending your buses to Southern Westchester BOCES?

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such a decision impact the intended loss, which is sufficient to establish the loss amount. *See* U.S.S.G. § 2B1.1, comment. (n.3(A)(ii)). The exclusions and credits discussed by the Guidelines do *not* include failure to pay fraudulent invoices. *See* U.S.S.G. § 2B1.1, comment. (n.3(D)&(E)). Third, Brega asserts that he provided free services to Rockland BOCES by sheer *ipse dixit*. Rockland BOCES disagrees. (PSR at 27). In any event, even in the unlikely event that Brega did provide Rockland BOCES with free services, the exclusions and credits discussed by the Guidelines do *not* include unrelated free services. *See* U.S.S.G. § 2B1.1, comment. (n.3(D)&(E)). Fourth, and perhaps most importantly, despite Brega’s assertion of offsets (Brega Sent. Mem. 11–12), Brega then purports to “accept[] responsibility for these loss amounts,” including the \$80,229.12 in fraudulent invoices, without the alleged offsets. (Brega Sent. Mem. 12).

<sup>27</sup> The district judge in *Desnoyers* did not take the bold position that clean-up costs were not properly part of the loss amount; rather, the question was whether, where those clean-up costs had not been submitted at the defendant’s original sentencing, could the district court consider them at a resentencing.

A Shortly after the buses started going over to Southern Westchester, I received a call from the Southern Westchester garage indicating that there were some real problems with buses that I had sent to them.

Q And what, if anything, did you do at that time?

A The next—the next day, I received an email from the gentleman who was the supervisor at Southern Westchester with pictures of the condition of the buses that they had started to work on.

Q And what did you do after you saw that?

A The first thing I did was swear, because the condition—what I was seeing in those pictures basically made me sick to my stomach.

Q And what did you do next?

A I took the pictures that I had received and sent them on to the school attorney so that he could see what I was seeing when I looked at -- looked at those buses.

Q Did you, in fact, go to Southern Westchester BOCES?

A Subsequently, I went over. Joe Gerosa, the supervisor, said you really need to come over and take a look at these. And based on what I was seeing in those pictures, yeah, I wanted to go over and see firsthand exactly what was going on with those buses.

Q And what sorts of things did you see?

A I saw brakes that were metal on metal where the brake pads had worn down to the point where there was no brake pad. And that was rubbing against those rotors. I saw a tremendous amount of rust on the underside of the carriage of those buses. There was issues with ball joints. There was issues with clamps that appeared to have been installed incorrectly. And I know that there was a window in one of the buses and it appeared that the window, a piece of glass, had been installed backwards.

Q What did you do when you saw the condition of the buses?

A Well, the first thing, I knew that I was going to have to start replacing those buses.

Part of—and parts of the—and you didn't ask me this, but I live Upstate where they get a lot more snow and salt Upstate. And Upstate, with the buses, you have to be very mindful of the amount of surface rust and rust on the undercarriage of the vehicle, because they won't pass a DOT inspection. A DOT inspector won't pass them if they have a tremendous amount of rust on the undercarriage of the buses. So Upstate, a bus won't last as long as it will down here, because they use a lot more salt.

But when I saw those buses and I saw the amount of rust and wear, it became very clear to me that I was going to have to start replacing those vehicles, that I could not, in good conscience, put children in those kind of vehicles and expect that they're going to be safely transported.

Q So what did you do to transport children at that time?

A Initially, we started obtaining new buses from the vendors as quickly as we could. But we also rented buses from Southern Westchester. He had a few buses so that we could send vehicles over for the maintenance for the major repairs to be done on those vehicles. He would send us back some of his spares so that I could continue to transport kids while my buses were being fixed.

(Tr. 84–86). In other words, the buses that Brega was supposed to maintain, but was not, in fact, maintaining, had fallen into a state of disrepair. As Joseph Gerosa, the Southern Westchester BOCES chief mechanic explained, quite common-sensically:

Q. Okay. What was the general condition of the buses when they were brought to Southern Westchester BOCES?

A. Poor shape.

Q. Were they in a condition that they should generally be driven on the road?

A. Most of them, no.

\* \* \*

Q. Having performed PMs [Preventative Maintenances] during your career, if PMs were performed properly on these buses, should these conditions have been previously found?

A. Yes, it would have been found. Yes. Sorry.

\* \* \*

Q. Did you come to any sort of conclusion about whether PMs were being properly performed on these buses?

A. They weren't being properly performed.

(Tr. 670–71). In other words, had Brega been doing his job—as he fraudulently claimed he was doing—the buses would not have been in such terrible condition and Rockland BOCES would not have had to pay over a hundred thousand dollars to repair them, and over twenty thousand dollars to rent buses during those repairs. Accordingly, that money is part of Brega's loss amount.

Brega argues otherwise. First, Brega argues that David Gleason—Rockland BOCES' assistant superintendent for business and operations—“was an official at Rockland BOCES, a Brega DOT competitor, with no experience in motor vehicle maintenance and who had a vested interest in stating that Brega DOT does a bad job of maintaining buses,” and therefore should not be believed. (Brega Sent. Mem. 11). This argument is odd: Rockland BOCES is not a Brega DOT competitor; indeed the reason Brega's whole scheme worked is that Rockland BOCES stopped maintaining its own buses and became Brega DOT's customer.<sup>28</sup> And he did not need extensive experience in motor vehicle maintenance: he was able to rely on Mr. Gerosa, as well as his own eyes and common sense. (Tr. 85–86). Of course, Mr. Gleason had—and has—no “vested interest in stating that Brega DOT does a bad job of maintaining buses”; to the contrary, Rockland BOCES ultimately lost over a million dollars that it would not have lost had Brega simply done his job.

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<sup>28</sup> Perhaps Brega meant to speak of Joseph Gerosa. But Southern Westchester BOCES is a government entity that is not a true competitor; rather, it services buses for a number of school districts, and is not even allowed to profit from that service. (Tr. 659–60). And there can be no question that Mr. Gerosa had “experience in motor vehicle maintenance.” (Brega Sent. Mem. 11).

Brega also argues that he should not be liable for his failure to maintain the buses because a DOT inspector “testified that the BOCES buses, despite being quite old, almost always passed inspection and would not have done so if not safe.” (Brega Sent. Mem. 11). However, even that inspector admitted that he relied, in part, on the preventative maintenance paperwork that Brega was forging. (Tr. 745–46). And he missed errors in the paperwork that would have caused him to write up the buses as non-compliant. (Tr. 767–68). And, looking at select pictures of the Rockland BOCES buses after the Brega contract was terminated, that those buses would not have passed inspection. (Tr. 783–86). And, of course, Brega arranged to have Rockland BOCES’s buses come in for repairs immediately before the DOT inspections, resulting in “[v]ery expensive” bills, but also in making sure that the buses would pass inspection on that day, even if they were not maintained previously. (Tr. 261).

Brega does not contest what he cannot—the horrific sights of the photographs of the buses he was supposed to maintain. While Mr. Gerosa walked this Court—and the jury—through those photos, no significant experience was necessary to see that these were not buses that were being properly maintained, or on which students—particularly special-needs students—should have been riding. The losses contained in the fraudulent invoices, the rental costs, and the repair costs are, frankly, lenient. Additionally, at the very least, Brega is morally responsible for the costs of replacing the buses, the inflated costs of the pre-inspection invoices, where Brega had to ramp up his repairs of buses that he had declined to maintain all along, and the various overcharges on the invoices (*see, e.g.*, Tr. 227 (detailing “half hour up-charge[s] for time to diagnose” and an “add[itional] one-tenth worth of labor across the board” for all invoices)), which, though difficult to calculate, can be considered under Section 3553(a). But there is little room to hold that Brega should not be held responsible for the natural, proximate consequences of his fraud.

## 2. Sophisticated Means

A two-level enhancement is warranted because the offenses involved sophisticated means and Brega intentionally engaged in or caused the conduct constituting sophisticated means.

Pursuant to Section 2B1.1(b)(10)(C), a two-level enhancement is warranted where the offense “involved sophisticated means.” The commentary to that provision of the Guidelines defines “sophisticated means” as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of that offense.” U.S.S.G. § 2B1.1, comment. (n.8(B)). The enhancement “targets conduct that is more complex, demonstrates greater intricacy, or demonstrates greater planning than a routine [criminal offense of the same variety].” *United States v. Lewis*, 93 F.3d 1075, 1080 (2d Cir. 1996).

The creation and use of false documentation is often an element of “sophisticated means.” *See, e.g., United States v. Amico*, 416 F.3d 163, 169 (2d Cir. 2005) (creation of false bank documents, appraisals, and blueprints); *see also United States v. Regensberg*, 381 F. App’x 60, 62 (2d Cir. 2010) (creation of fake loan documents and fraudulent earnings statements). The fact that a scheme is not particularly elaborate does not mean that it does not employ sophisticated means; indeed, the commentary provides the example of a telemarketing operation that locates its main office in one jurisdiction but conducts operations in another, U.S.S.G. § 2B1.1, comment. (n.8(B)), which the Second Circuit has described as “not an especially elaborate scheme.” *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003), *vacated on other grounds sub nom. Lauersen v. United States*, 543 U.S. 1097 (2005).

Where a defendant’s scheme involves various steps, the enhancement may apply “even if each step in the scheme was not elaborate.” *United States v. Jackson*, 346 F.3d at 25. In other words, “[r]epetitive or coordinated conduct, though no one step is particularly complicated, can be a sophisticated scheme.” *United States v. Finch*, 407 F.3d 908, 915 (8th Cir. 2005); *see also*

*Jackson*, 346 F.3d at 25 (upholding application of enhancement where “the total scheme was sophisticated in the way all the steps were linked together so that [the defendant] could perceive and exploit different vulnerabilities in different systems in a coordinated way”).

Here, the criminal conduct was “more complex, demonstrate[d] greater intricacy, [and] demonstrate[d] greater planning than a routine” fraud. *United States v. Lewis*, 93 F.3d at 1080.

Among other things:

- The plan required Brega to create a lengthy paper trail, in close coordination with Popkave, to ensure that it *looked* as though he was performing preventative maintenance on a long series of buses even though he was not only not doing so, but the buses were not even coming into his shop.
- There was data regarding the buses in various places, including the bus books, which showed the day-to-day mileage of the buses, the Saturday fluid check lists, which included the mileage of each of the buses, and Brega’s own records created when the buses did, in fact, come in for maintenance. Accordingly, the plan required Popkave to review data from his Saturday fluid checks which he would use to determine which buses were *supposed* to be serviced by Brega at what times, and then to forward the data from those checks to Brega so that Brega could attempt to reconcile his fraudulent paperwork with the data in the bus books—which was presumably the same as the Saturday fluid check lists—the check lists themselves, and Brega’s own records. Additionally, Popkave selected those buses that were supposed to come in for preventative maintenance so that DOT inspectors would believe that the buses received timely preventative maintenance.
- In order to accomplish the fraud, Brega had to create the paperwork to look like he performed an entire preventative maintenance on each bus. So he did not only bill Rockland BOCES for the preventative maintenances; he opened repair orders, created fraudulent invoices *and* fraudulent preventative maintenance worksheets, crafted to look as though a mechanic had done a bumper-to-bumper inspection, and closed repair orders.
- Brega took the time to instruct his subordinates on the details of what to do:

Q. What happened in December 2012?

A. I had received an email from Richard with the series of buses that were notated by bus numbers as well as the mileages on said buses, followed up with a phone call. If I remember correct, I think it was a Friday night or a Saturday when it actually happened.

He had instructed me to go ahead and bill for those buses that were outlined in the email, a 504 sheet, which was what we referred to the PM invoice as, and he had told me to fill out a PM sheet like I would normally with the regular bus and then to close said paperwork and put it away, to file it.

Q. Did he say in what manner you were supposed to do all of this?

A. Yes. He said I was supposed to—basically outlined exactly how to do it, and then told me to get—open repair orders, fill out PM sheets, close them, and just put them away.

Q. And to be clear, when you say fill out the PM sheets, you mean the checklists?

A. Yes, sir.

Q. What was the basis of supposed to be for filling out the PM sheets?

A. Everything has a passed item on there with the exception of what was being billed for, which was the oil change.

Q. And who told you to do that?

A. Richard.

Q. Did you, in fact, do what Richard told you to do, that is, create these false PM sheets and invoices?

A. Yes.

(Tr. 264–65; *see also* Tr. 398–400 (Bobbi Ann Lepore describing similar instructions from Brega)).

- Brega ensured that Rockland BOCES buses came in for actual repairs in the days before DOT inspections so that they could be repaired sufficiently to pass inspection; were they inspected in their deteriorated, unmaintained shape—as they came to Southern Westchester BOCES—the fraud would have been rapidly uncovered. (Tr. 261).

This is far more than enough to trigger the sophisticated means enhancement. *See, e.g., United States v. Amico*, 416 F.3d at 169 (district court did not err in finding sophisticated means where the offense involved, inter alia, the submission of multiple false documents); *United States*

*v. Cole*, 296 F. App'x 195, 197 (2d Cir. 2008) (sophisticated means enhancement applied where the defendant “solicited money in one jurisdiction and represented that his company’s office was located in another. He also incorporated an entity in a foreign jurisdiction and utilized that corporate shell to make his scheme appear legitimate.”); *Abreu v. United States*, Nos. 09 Civ. 10276 (RPP), 06 Cr. 102 (RPP), 2010 WL 2483993, at \*7 (S.D.N.Y. June 15, 2010) (holding that, where a crime “involved false contracts, falsifying MIS records, false invoices and the cooperation of outside parties, ... it was sophisticated.”); *cf. United States v. Lewis*, 907 F. Supp. 683, 689 (S.D.N.Y. 1995) (Scheindlin, *J.*) (holding that the sophisticated-means enhancement did not apply where “there [wa]s no proof that invoices were ever created to support the alleged expenses.”).

### **3. Separate Bribes**

The Guidelines provide for a two-level enhancement if a bribery “offense involved more than one bribe or extortion.” U.S.S.G. § 2C1.1. The Second Circuit has laid out three non-exclusive factors that this Court should take into account in determining whether the offense involved multiple bribes. *See United States v. Arshad*, 239 F.3d 276, 280–83 (2d Cir. 2001) (citing *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000)).

“The first factor ... is whether ... the payments were made to influence ‘a single action.’” *Id.* (citing *Middlemiss*, 217 F.3d at 124). Here, there were multiple actions: every month or so, Popkave sent Brega a brand new list of buses and mileages; every month or so, Brega had his employees prepare false invoices and paper trails to correspond to those buses and mileages; every month or so, Popkave approved a new batch of fraudulent invoices for payment, causing those invoices to be paid, often on a new purchase order. These were all separate “action[s].” U.S.S.G. § 2C1.1, comment. (n.2). While the facts of *Arshad* may not be decisive on this point, the cases that the Second Circuit cited approvingly are; the Second Circuit cited *United States v. Martinez*, 76 F.3d 1145, 1153 (10th Cir. 1996) (upholding district court’s finding of multiple bribes where

payments were made in exchange for ongoing patient referrals); *United States v. Kahlon*, 38 F.3d 467, 470 (9th Cir. 1994) (concluding that “payments to promote different applications for work papers ... were not installment payments for a single action.”); *United States v. Evans*, 30 F.3d 1015, 1016–17, 1020 (8th Cir. 1994) (affirming, without analysis, district court’s finding that § 2C1.1(b)(1) enhancement was warranted where defendant, a state insurance examiner, accepted bribes to approve two different insurance applications). *See Arshad*, 239 F.3d at 280 (parenthetical descriptions quoted from *Arshad*).

“A second factor ... [is] whether the pattern and amount of payments bear the hallmarks of installment payments, such as a regular schedule of payments over a finite period of time toward a fixed final sum, rather than a series of intermittent and varied bribes.” *Arshad*, 239 F.3d at 281. Here, Brega’s payments to Popkave—consisting of forgiveness of debt to effectuate free service of vehicles that Popkave brought to Brega—were intermittent and varied. Popkave brought in different vehicles at different times, causing wildly varied charges that would never be repaid. (GX 508). Indeed, even Brega’s decisions to zero out Popkave’s bills were intermittent and varied: On January 31, 2013, Brega forgave Popkave \$47,318.81; on December 10, 2014, Brega forgave Popkave \$30,000; on January 6, 2015, Brega forgave Popkave \$9,608.76; on February 13, 2015, Brega forgave Popkave \$76.87; and on May 4, 2015, Brega forgave Popkave \$216.91. (GX 508). Moreover, the ultimate beneficiary was intermittent and varied. Sometimes Popkave brought in his own vehicles. (Popkave Tr. 44–47). Sometimes Popkave brought in his church’s vehicles. (Popkave Tr. 48). Sometimes Popkave brought in his son’s vehicles. (Popkave Tr. 48). Sometimes Popkave brought in his girlfriend’s son’s vehicles. (Popkave Tr. 48). Sometimes Popkave brought in his friends’ vehicles. (Popkave Tr. 48). Again, the cases cited approvingly in *Arshad* all weigh in favor of finding multiple bribes. *See Middlemiss*, 217 F.3d at 124 (upholding imposition of two-

level enhancement under § 2C1.1(b)(1) for multiple extortions, one consisting of regular monthly payments and the other of a lump sum payment); *United States v. Morales*, 11 F.3d 915, 917 (9th Cir. 1993) (rejecting argument that multiple payments constituted installments on single bribe in part because payments “came ... in different amounts and at different intervals”); *Martinez*, 76 F.3d at 1153 (upholding finding that more than one bribery occurred where agreement “was not for a final fixed sum paid in regular installments” but instead was “open-ended” and involved occasional “bonus” payments); *United States v. Goodson*, 96 Cr. 207 2000 WL 680278, at \*6, (E.D. La. May 25, 2000) (enhancing offense level under § 2C1.1(b)(1) where payments “were separated in time” and “were ... in different amounts and took different forms”). See *Arshad*, 239 F.3d at 281–82 (parenthetical descriptions quoted from *Arshad*).

“Finally, courts ... have looked at whether the method for making each payment remains the same—whether, for example, the payments involve the same payor and payee in each instance, and whether payments are made in the same form and by the same means.” *Arshad*, 239 F.3d at 282. However, the Circuit noted, “while the existence of multiple payees and payment methods may demonstrate the existence of multiple bribes, ... the opposite is not true: An identity of payees and payment methods does not, by itself, establish that separate payments for separate purposes constitute a single bribe.” *Id.* Here, like in *Arshad*, even the superficial commonality of methodology of payment does not undermine the multiplicity of bribes. Moreover, a deeper dive shows that the payment methods were not identical: some involved straight forgiveness of loans, others involved forgiveness by virtue of Popkave’s obstructive “sale” of tools to Brega, which Popkave expected would ultimately be paid back.

Brega argues, quite simply, that the “bribery ‘payments’ or free repairs were all related to a single fraudulent scheme and the 2-point enhancement should not be applied to Mr. Brega’s

Guidelines calculation.” (Brega Sent. Mem. 13). Arshad made the same argument; the Second Circuit rejected it:

Arshad’s argument also runs afoul of the history of § 2C1.1(b)(1). The original version of § 2C1.1 did not include an enhancement for multiple bribes. As a result, “repeated instances of bribery ... involv[ing] the same course of conduct or common scheme or plan and the same victim” were not reflected in a defendant’s final offense level, because multiple counts of bribery in such circumstances would be grouped together pursuant to § 3D1.2. U.S.S.G. app. C, amend. 121, at 48. The Commission addressed this issue by amending § 2C1.1 in 1989 “to provide a 2 level increase where the offense involved more than one bribe.” *Id.*

*Arshad*, 239 F.3d at 281 n.2.

#### **4. High-Level Official**

Brega’s bribery offense “involved [a] public official in a high-level decision-making ... position,” and, therefore, four offense levels are added. U.S.S.G. § 2C1.1(b)(3). A “high-level decision making” position is “a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.” U.S.S.G. § 2B1.1, comment. (n.4(A)). Here, Popkave had total authority over the decision-making process in authorizing payment by Rockland BOCES—a government entity—of the fraudulent invoices generated by Brega, including sole authority to determine when and whether buses were sent to Brega:

Q Who at Rockland BOCES was tasked with determining when buses went to Brega D.O.T. to get their PM inspections?

A Mr. Popkave.

Q Did anyone above Popkave at Rockland BOCES do anything to verify that Popkave was, in fact, getting those buses their PMs at Brega D.O.T.?

A To the best of my knowledge, no.

\* \* \*

Q How did Rockland BOCES pay Brega for repairs and maintenance?

A Brega would submit invoices back to Rockland BOCES indicating that the—Bus 100 had been worked on and the charges for working on that particular bus was X. Those invoices would be directed to Mr. Popkave. Mr. Popkave would then sign off on those invoices, indicating that they were approved for payment. They would then come over to the business office to go to accounts payable. Accounts payable would process the invoice against the purchase order that we had with Brega D.O.T. Once the accounts payable clerk had finished her cycle, they would be reviewed—the invoices would be reviewed by an internal claims auditor to make sure that the check amount and the invoice—everything matched and that the math was correct, at which point a check would be issued as payment for the invoice that had been submitted.<sup>[29]</sup>

Q Let's step through those one at a time, if I may.

\* \* \*

Q So the invoice is submitted to Rockland BOCES, and you said that—who does it go to at Rockland BOCES?

A It goes to Mr. Popkave.

Q And what is Mr. Popkave's step in the process?

A I believe that he would review it for accuracy. And then, once he was satisfied that the invoice was correct or accurate, then he would sign it, indicating that he had approved the invoice for payment.

Q Did anybody do anything to verify that Mr. Popkave was correct when he signed the invoice as accurate?

A Not to the best of my knowledge.

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<sup>29</sup> Others in the process, such as Clair Blaha and the internal claims auditor, were involved only to the extent that they ensured that payments were allocated to the proper purchase orders and that payments matched the invoices that Popkave directed to be paid. (Tr. 62–63).

(Tr. 60–62). This is why Brega approached Popkave in the first place: Popkave had the authority to make the essential decisions for Rockland BOCES. Indeed, notably, Brega invited Popkave to get-togethers with important local politicians; Brega considered them all to be high-level decision-makers who he had to grease. (Popkave Tr. 40). Brega does not detail his argument against this enhancement, other than to say that Popkave’s “role was not a high-level or sensitive one.” (Brega Sent. Mem. 13). Brega’s argument, which cites no facts, is unpersuasive.

## 5. Obstruction of Justice

Brega obstructed justice in two ways: (1) he obstructed justice by scheming with Popkave to cover up Popkave’s ever-mounting unpaid service bills—which would provide solid evidence of the bribery scheme—by having Popkave purportedly pay the bills, generating cash by selling Brega his tools in a sham transaction; and (2) he suborned the perjury of Frank Walker.

First, in late 2014, Brega became very concerned that investigators were closing in on him. (GX 715).<sup>30</sup> While Popkave was at Brega’s offices, Brega took Popkave into the parking lot for a walk-and-talk. (Popkave Tr. 63–65).<sup>31</sup> Brega explained that he “was concerned that he was going to be investigated for his business actions.” (Popkave Tr. 67). Accordingly, Popkave’s open bill—that is, the evidence of Brega’s bribery of Popkave—“needed to be cleared up.” (Popkave Tr. 67). “He said that myself and others, that he had money out there that he needed to clear up. What we call on-the-street-money, you know, or and so mine was an open account, as were others that he was collecting money on, to clear up all his open accounts.” (Popkave Tr. 67).

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<sup>30</sup> This description of the charged obstruction, proved at trial, tracks the description in the “Offense Conduct” section, above.

<sup>31</sup> In a text message to Popkave, during which Brega spoke in code because he believed that “my phone is being monitored,” Brega explained that his concerns were about “[w]hat we talked about walking the parking lot a couple of weeks ago.” (GX 715).

In other words, Popkave needed to repay the money he owed Brega DOT in order to conceal the fact that Brega was providing Popkave with free services. Popkave knew that he owed Brega around \$40,000. (Popkave Tr. 68). Popkave only had around \$10,000 available, so Brega asked Popkave if Popkave had anything of value that Brega could purchase in order to provide Popkave with money to pay down Popkave's account balance; Popkave had a motorcycle that he did not want to give up and mechanic's tools worth around \$40,000. (Popkave Tr. 68–73). Brega and Popkave ultimately agreed that Brega would “purchase” of Popkave's mechanic's tools for the \$30,000 balance of the account. (Popkave Tr. 68, 70–71). Popkave would take that money, turn around, and pay it right back to Brega, only, on paper, it would be to pay off his bill. (Popkave Tr. 71). This would all be a sham transaction, as Brega agreed to pay Popkave back over time for the money Popkave would “receive” for the tools and then hand back to Brega. (Popkave Tr. 68, 73).

Popkave did as asked. Brega then gave Popkave a \$30,000 check for the tools, and Popkave turned around and paid Brega the account balance, and then nearly \$10,000 additional cash. (Popkave Tr. 73–80; GX 10-13). In particular, on December 3, 2014, a \$30,000 cashier's check was issued from the account belonging to one of the Brega Enterprises at the Greater Hudson Bank, NA to Popkave with the memo reading “TOOLS FOR NEW BUSINESS.” (GX 10). On December 8, 2014, Popkave deposited the \$30,000 in his personal bank account. (GX 11). Two days later, on December 10, 2014, Popkave wrote a personal check to Brega DOT for \$30,000. (GX 12). On January 2, 2015, Popkave wrote a personal check to Brega DOT for \$9,608.26. (GX 13). Brega cleared Popkave's bill. (Tr. 541–42; GX 508). Popkave understood that Brega would eventually reimburse Popkave for the money that Popkave had just paid Brega. (Popkave Tr. 68, 73).

This, alone, constitutes obstruction. Brega simply argues in return: “Having been acquitted of Count 5 [the obstruction charge], Mr. Brega should not receive a Guidelines enhancement for obstruction of justice.” (Brega Sent. Mem. 14). This is not the law. Rather, the law plainly authorizes district courts to consider acquitted and uncharged conduct at sentencing if such conduct has been proven by a preponderance of the evidence. *See United States v. Jones*, 531 F.3d 163, 176 (2d Cir. 2008) (holding that “acquitted conduct may be treated as relevant for purposes of Guidelines calculations ‘so long as that conduct has been proved by a preponderance of the evidence.’” (quoting *United States v. Watts*, 519 U.S. 148 (1997))); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (“[D]istrict courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct”). As the Second Circuit has explained, “[t]he sentencing court’s discretion is largely unlimited either as to the kind of information it may consider, or the source from which it may come.” *United States v. Sisti*, 91 F.3d 305, 312 (2d Cir. 1996) (quoting *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989)). “A sentencing court is free to consider hearsay evidence, evidence of uncharged crimes, dropped counts of an indictment and criminal activity resulting in acquittal’ in determining sentence.” *Id.* (quoting *United States v. Reese*, 33 F.3d 166, 174 (2d Cir. 1994)); *see also United States v. Gomez*, 580 F.3d 94, 105 (2d Cir. 2009); *United States v. Florez*, 447 F.3d 145, 148–49, 156 (2d Cir. 2006).

Indeed, the Supreme Court has itself recognized that district courts may consider uncharged and acquitted conduct at sentencing. In *United States v. Watts*, 519 U.S. 148, 157 (1997), the Court held that “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” The rationale for this rule is straightforward: an acquittal means

only that particular conduct was not proved beyond a reasonable doubt; it does not foreclose a court from finding the same conduct by the lower preponderance-of-the-evidence standard applicable at sentencing. *Id.* at 155–56; *see also United States v. Pica*, 692 F.3d 79, 88 (2d Cir. 2012) (“A district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of evidence that the defendant committed the conduct.”); *Rita v. United States*, 551 U.S. 338, 352 (2007) (the Court’s “Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence”); *Vaughn*, 430 F.3d at 526 (holding that *United States v. Booker*, 543 U.S. 220 (2005), does not “undermine the continued validity of the ruling in *Watts*” that “a district court may sentence a defendant taking into account acquitted conduct”).

Here, despite the jury’s verdict, the evidence of Brega’s obstruction of justice was overwhelming, and far greater than a preponderance of the evidence. Accordingly, this Court should apply an obstruction enhancement under U.S.S.G. § 3C1.1. *See, e.g., United States v. Thaler*, 229 F. App’x 7, 10 (2d Cir. 2007) (affirming obstruction enhancement where the jury acquitted on the obstruction count).

Second, Brega suborned Mr. Walker’s perjured testimony. The Guidelines are clear: the obstruction enhancement applies to “suborning, or attempting to suborn perjury.” U.S.S.G. § 3C1.1, comment. (n.4(B)). Brega called Mr. Walker in his defense, in order to influence the jury by causing them to believe that Rockland BOCES’ buses were, in fact, being maintained at Brega every Saturday. Mr. Walker so testified:

Q. Do you have an office at the Brega facility?

A. Yes, sir, I do.

Q. Where is that office?

A. If you walk in the glass doors in the front of the building, you walk to the end, my office is on the right. I have windows to see into the shop.

Q. Does your office have a window?

A. Yes, sir, it does.

Q. What can you see from the window?

A. I can see the six bays, there's six bays that primarily do all of the school bus work and there is a bay door that I can see outside of.

Q. Can you see buses coming in-and-out of the Brega facility?

A. Yes, sir, I can.

Q. Do you ever work at Brega on weekends?

A. Yes, sir.

Q. How frequently do you work on Saturdays?

A. Almost every Saturday.

Q. From 2012 to 2014 did you often see BOCES buses at Brega?

A. I would say the shop on Saturday was full pretty much of all BOCES' buses

\* \* \*

Q. You said that you work at Brega DOT?

A. Yes, sir.

Q. You've worked there since 2012?

A. Yes, sir.

Q. And you said that you usually worked Saturdays, is that what you said?

A. Yes, sir.

Q. And you said that you saw at Brega DOT when you were working on Saturdays lots of BOCES' buses most Saturdays, is that what you said?

A. On any given Saturday there was a quite a few BOCES' buses, yes, sir.

Q. When you say any given Saturday, are you saying every Saturday?

A. Yes.

Q. So, your testimony today is you were there every Saturday with lots of BOCES' buses?

A. Yes, sir.

(Tr. 810–11, 820–21). As the jury found, that testimony was false.<sup>32</sup> The jury found Brega guilty of wire fraud, which was predicated on Rockland BOCES' buses *not* being at Brega DOT on Saturdays, in spite of the fraudulent invoices stating otherwise. Brega apparently agrees that the testimony was false, admitting his guilt. (Brega Sent. Mem. 15–16). Mr. Walker's clear, unequivocal, wholly objective testimony was therefore perjurious. *See, e.g., United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (holding that the obstruction of justice enhancement applies when a defendant testifying under oath “gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory.”); *accord United States v. Zagari*, 111 F.3d 307, 329 (2d Cir. 1997), *see also, e.g., United States v. Kelly*, 147 F.3d 172, 178–79 (2d Cir. 1998) (holding that an obstruction enhancement based on perjury must be supported by a finding that the testimonial “statements unambiguously demonstrate an intent to obstruct.”); *United States v. Salim*, 549 F.3d 67, 74–75 (2d Cir. 2008)

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<sup>32</sup> Mr. Walker also falsely testified that he himself put up the money that he gave to a local politician in 2013. (Tr. 829–36). In fact, Brega has pleaded guilty to falsifying business records in relation to a scheme to provide straw donations to local politicians, including the donation about which Mr. Walker testified.

(noting that such findings may be made by a preponderance of the evidence). And Brega, knowing that Rockland BOCES' buses were not at Brega DOT on Saturdays, knew that the testimony was perjurious, yet he elicited it and chose not to correct it. This, too, merits an obstruction enhancement. *See, e.g., United States v. Johnson*, 968 F.2d 208, 215–16 (2d Cir. 1992) (affirming obstruction enhancement for eliciting perjurious testimony during trial).

## 6. Vulnerable Victims

Brega's fraud affected not just Rockland BOCES at large, but also those who Rockland BOCES' buses served: special needs students. (Tr. 52 (explaining that Rockland BOCES' buses are used, approximately 90% of the time, for transporting students with special needs, including those who use the special wheelchair-capable buses that Brega specialized in maintaining)). Large numbers of students were forced to travel—unwittingly—on buses that were simply not safe. (Tr. 86 (“I could not, in good conscience, put children in those kind of vehicles and expect that they’re going to be safely transported.”)). These, too, qualify as victims under the Guidelines.

In particular, “[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim,” two offense levels are added, and, where the defendant so knew, if “the offense involved a large number of vulnerable victims,” another two offense levels are added. U.S.S.G. § 3A1.1(b)(1)&(2). The victim need not be the direct victim of the fraud; rather, “even where there is a scam, ... the economic impact of which is on the government, an enhancement for vulnerable victims is appropriate where the exploitation of patients is part of the scam.” *United States v. Echevarria*, 33 F.3d 175, 181 (2d Cir. 1994), rev'd by regulation on other grounds (internal quotation marks omitted). This concept of indirect victims is accepted by most Circuits. *See, e.g., United States v. Sidhu*, 130 F.3d 644, 655 (5th Cir. 1997) (adjustment applied where patients were made addicted to pain treatment as part of an insurance fraud scheme; the patients were merely indirect victims of the scheme and the insurer was the direct victim); *United States v.*

*Sherwood*, 98 F.3d 402, 412–13 (9th Cir. 1996) (adjustment applied where a teenager was kidnapped and forced to strip and pose for photographs; the charge was money laundering conspiracy rather than kidnapping, and the teenager was merely an indirect victim of the crime of money laundering); *United States v. Yount*, 960 F.2d 955, 957–58 (11th Cir. 1992) (adjustment applied where the bank accounts of elderly individuals were raided by a bank vice-president; the elderly individuals were merely indirect victims, and the bank was the direct victim because it reimbursed the individuals’ accounts when the scheme was discovered); *United States v. Lee*, 973 F.2d 832, 833–34 (10th Cir. 1992) (following *Yount* but rejecting enhancement on other grounds); *but see United States v. Dixon*, 66 F.3d 133, 135–36 (6th Cir. 1995) (holding that an indirect victim was not a “victim” for the purposes of U.S.S.G. § 3A1.1).

Here, Brega undoubtedly defrauded Rockland BOCES.<sup>33</sup> But, in doing so, he put large numbers of special-needs children at risk. If they do not qualify as vulnerable victims, it is unclear who would.

### **C. The Court Should Impose a Very Significant Sentence of Imprisonment**

A very significant sentence of imprisonment is sufficient, but not greater than necessary, to comply with the purposes of sentencing. The Section 3553(a) factors most applicable in this case include the nature and circumstances of the offense of conviction, the seriousness of the offense, the need to provide just punishment, the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, and the history and characteristics of the defendant. None of these factors militates for Brega receiving a non-custodial sentence.

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<sup>33</sup> Indeed, a moving letter from David Gleason, of Rockland BOCES, is attached as Exhibit A.

**1. The Nature and Seriousness of the Offense, and the Need to Provide Just Punishment**

The nature, circumstances, and seriousness of the offense—a continuous pattern of knowing and willful frauds upon a school district, nearly non-stop bribes over the course of years to induce that fraudulent conduct, willful attempts to obstruct justice, and the risk that it all placed on the most vulnerable people in our society—and the need for just punishment warrant a very significant sentence of imprisonment. Brega started bribing Popkave as part of a pattern of greasing local politicians and other influencers for the sole purpose of improving his bottom line. He then engaged in a sophisticated and intricate scheme to defraud Popkave’s employer, using Popkave, coordinating the fraud, and generating a bevy of false paperwork so that not only could Brega get paid, but unsafe buses could remain on the road unmaintained. Ultimately, when Brega learned that he was being investigated, he doubled down, persuading Popkave to engage in yet another corrupt deal, this one with the purpose of lying not to Rockland BOCES, but to federal investigators. He had no compunction putting the government to its burden, perhaps because he saw a glimmer of light in his own willingness to elicit false testimony on the stand. And then he demonstrated utter chutzpah, claiming in his sentencing memorandum that, now that he stood convicted, with no other options, he is ready to take responsibility.

The seriousness of the offense is further amplified here by several factors. First, Brega was a leader of the criminal scheme, not hesitating to come up with a scheme, and direct his subordinates to assist in his criminal enterprise, which adds to his culpability and increases the need for just punishment. *See* U.S.S.G. § 3B1.1, comment. background (recognizing that “persons who exercise a supervisory or managerial role in the commission of an offense . . . present a greater danger to the public and/or are more likely to recidivate”). Second, Brega attempted to obstruct the investigation and elicited perjurious testimony at trial “in an unlawful attempt to avoid

responsibility,” which makes him “more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process.” *Dunnigan*, 507 U.S. at 97. Third, although Rockland BOCES may have lost a couple hundred thousand dollars (and more than a million in replacing its bus fleet), the special-needs students of Rockland BOCES lost far more without even realizing it: they were put at risk so that Richard Brega could improve his bottom line, making his monthly minimum, thus triggering several vulnerable victim enhancements. Indeed, to quote David Gleason:

It has been stated that there were no accidents and no one was injured as a result of the scheme perpetuated by Mr. Brega. Merely because no child was injured does not mean that Mr. Brega should not be held fully accountable for his wrongdoing. His misconduct created a very dangerous situation where one or more students could have been injured or killed and the fact that good fortune intervened does not excuse what he did.

Neither the very medically fragile children who are entrusted to BOCES, nor their parents/guardians, could ever understand why the yellow bus that comes to their front door to transport them to and from school was potentially a disaster waiting to happen.

This criminal scheme in which Mr. Brega engaged is remarkable for just how brazen it actually was. He not only acted to defraud Rockland BOCES in order to seek financial gain but in so doing he knowingly put in harm’s way the most precious resource that any of us have, our children.

(Exhibit A. at 3). These aggravating factors make the need for just punishment in Brega’ more acute, and support the imposition of a very significant sentence of imprisonment.

## **2. The Need to Promote Respect for the Law and to Afford Adequate Deterrence**

The need for the sentence to promote respect for the law and to afford adequate deterrence further supports imposition of a very significant sentence of imprisonment. Promoting respect for the law by Brega is particularly important in light of his persistent refusal to accept responsibility for his crimes. First, Brega attempted to obstruct the investigation. Second, Brega attempted to

free himself by eliciting perjured testimony. Now, in connection with this sentencing proceeding, Brega finally admits that he committed his crime—though he limits even that only “to the wrongful conduct for which he had been convicted”—because he has no other choice. Having failed to internalize that he did anything wrong until it benefited him to do so, Brega demonstrates little reason to believe that he will respect the law—or give others a reason to respect the law—absent a very significant prison term.

A significant sentence of imprisonment would also serve general deterrence and promote respect for the law in the public. The non-custodial sentence requested by Brega would diminish respect for the law and undermine general deterrence, as it would be seen as a slap on the wrist for a defendant involved in a scheme to repeatedly lie to Rockland BOCES, bribe a school district official, and put particularly vulnerable children at risk. A non-custodial sentence would have a particularly negative effect here because it would send a message to powerful businessmen like Brega that they can engage in criminal conduct without facing the most serious consequences, which would in turn infect entire business cultures. *See DeRiggs*, 72 F.3d 7, 8 (2d Cir. 1995) (“[A] corrupt executive who is seen to be corrupt by subordinates leads by example.”). A significant incarceratory sentence, on the other hand, would send an important message that even powerful businessmen cannot approve lying and stealing from school districts and putting children at risk and obstructing justice with impunity because they will be subject to serious federal penalties.

### **3. The History and Characteristics of the Defendant**

Brega requests a non-custodial sentence. When considering “the kinds of sentences available,” 18 U.S.C. § 3553(a)(3), this Court should view with a skeptical eye a request for a non-incarceratory sentence when the Guidelines recommend a substantial prison term. *See United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007) (“When the guidelines, drafted by a respected public body with access to the best knowledge and practices of penology, recommend that a

defendant be sentenced to a number of years in prison, a sentence involving no . . . imprisonment can be justified only by a careful, impartial weighing of the statutory sentencing factors.”); *United States v. Kononchuk*, 485 F.3d 199, 205 n.4 (3d Cir. 2007) (Guidelines disallowance of probation is advisory but still entitled to “some weight”). Brega relies on two aspects of his personal history, neither of which warrants the complete variance he seeks.

*First*, Brega emphasizes the effect an incarceratory sentence would have on his family. (Brega Sent. Mem. 2, 6). Although this Court may consider this under the auspices of “the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1), *see United States v. Thavaraja*, 740 F.3d 253, 262-63 (2d Cir. 2014) (courts may consider “the impact deportation will have on the defendant and his family”); *United States v. Jones*, 460 F.3d 191, 194 (2d Cir. 2006) (explaining that after *Booker*, courts may consider “family ties” among other factors), it ought not do so here. Indeed, Section 3553(a) also directs courts to consider the Sentencing Commission’s policy statements. 18 U.S.C. § 3553(a)(5). As relevant here, Congress directed the Sentencing Commission to assure that the Guidelines and policy statements, “in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering,” among other factors, “family ties and responsibilities . . . of the defendant.” 28 U.S.C. § 994(e). Accordingly, the Guidelines provide that “family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.” U.S.S.G. § 5H1.6.

The Guidelines recommend that the seeming tension between these considerations be balanced as follows. Family ties and responsibilities are appropriately considered in determining a sentence “*within* the applicable guideline range”; whether a defendant should be sentenced to probation if he is in Zone A or B of the Sentencing Table; and the appropriate conditions of probation or supervised release. U.S.S.G. ch. 5, pt. H intro. cmt. (emphasis added). But family ties

and responsibilities “are not ordinarily relevant to the determination of whether a sentence should be *outside* the applicable guideline range,” except in “exceptional cases.” *Id.* (emphasis added).

Here, Brega has a wife and five children. However, they have the support of Brega’s family, and moreover, Brega is a man of means, with over \$2 million in assets, including a 4,200-square-foot home in an “upper class neighborhood” (PSR ¶¶ 83, 104)—and he makes no claim that his family will lack the financial resources needed during his incarceration. Therefore, Brega is a far cry from the single mother in *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992), who was the only caretaker available for four young children. The hardships that Brega’s family will face while he is in prison are more akin to those suffered by the families of most defendants—defendants, like Brega, who have the means to support and care for their families even while in prison. *See United States v. Cutler*, 520 F.3d 136, 165 (2d Cir. 2008) (“[The defendant’s] wife and children will no doubt face hardship, but this is true whenever family members are deprived of the company and/or support of a defendant who is incarcerated.”); *United States v. Smith*, 331 F.3d 292, 294 (2d Cir. 2003) (“It is not unusual ... for a convicted defendant’s incarceration to cause some hardship in the family.”); *United States v. Johnson*, 964 F.2d at 128 (“[M]any defendants shoulder responsibilities to their families .... Disruption of the defendant’s life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration”).

*Second*, Brega invokes his reputation, citing letters from friends and family describing his record of employment and the support and generosity he has shown to others over the years, stating “Honorable, respected, kind, generous, decent—these words are not often used when describing a convicted felon. Yet, these are the words used time and time again to describe Richard Brega ....” (Brega Sent. Mem. 5). Like family ties, such factors may be considered as part of “the history and

characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). Nevertheless, a defendant’s employment history and “prior good works” are discouraged bases for departure. *See* U.S.S.G. § 5H1.5 (“Employment record is not ordinarily relevant in determining whether a departure is warranted.”); § 5H1.11 (“Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted”). As discussed above, the Guidelines recommend that courts balance the consideration of factors under Section 3553(a) with policy statements discouraging consideration of such factors by deeming such factors “not ordinarily relevant to the determination of whether a sentence should be *outside* the applicable guideline range,” except in “exceptional cases.” U.S.S.G. ch. 5, pt. H intro. cmt. (emphasis added).

Here, Brega’s business record and reputation do not support a downward variance to a non-custodial sentence. “[E]xcellent character references are not out of the ordinary for an executive who commits white-collar crime; one would be surprised to see a person rise to an elevated position in business if people did not think highly of him or her.” *United States v. McClatchey*, 316 F.3d 1122, 1135 (10th Cir. 2003). In any event, whatever Brega’s reputation in the workplace was, or in the eyes of those who were unaware of his crimes of conviction, that reputation must be discounted by the fact that he committed the instant offense. Having been convicted by a jury of participating in a fraudulent scheme and bribery in his capacity as a businessman, Brega cannot now seriously claim that his business reputation is beyond reproach.

Nor do Brega’s charitable and other good works support a non-custodial sentence. Brega’s past generosity is “to be commended,” but he “should not be allowed to treat charity as a get-out-of-jail card.” *United States v. Vrdolyak*, 593 F.3d 676, 682 (7th Cir. 2010). Indeed, “it is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate

executives ... to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts.” *Id.* at 683 (internal quotation marks omitted).

**4. The Defendant This Court Is Sentencing—Unlike the Defendant Depicted in Brega’s Gauzy, Fulsome Sentencing Submission—Merits a Substantial Term of Imprisonment**

In seeking to avoid prison for the fraud and bribery he committed for years, to which he did not admit and for which he was convicted at trial, Brega asserts that his criminal conduct is “anomalous” and “stands in stark contrast with his otherwise lawful, extraordinary personal and professional history,” marked by generosity to his community. (Brega Sent. Mem. 2, 4.) Brega offers letters purportedly from numerous reliable supporters, which go so far as to call him “a gift from God.” (Brega Sent. Mem. 8.)

The version of Brega presented to this Court for purposes of sentencing, however, is an illusion. The only “stark contrast” between Brega’s criminal conduct and his behavior otherwise is that, when it came to his defrauding the Rockland BOCES school district, he got caught. Rather, Brega’s criminal conduct exemplifies his character, and is not the lone instance when he has engaged in a deceptive scheme to amass for himself wealth or power. Brega himself—when speaking candidly to Popkave, rather than ingratiating himself to this Court—summed up his character and his goals:

No plans for me to be a Politician. I like being the guy who tells them what to do. I am the pupptieer [sic].

(Ex. B at 1 (text Messages between Brega and Popkave; *see also id.* at 61 (referring to a new service offered by his company: “What [sic] till they all get addicted to it, then I’m going to charge everyone to have access to it. Lol, I will make a Gazillion \$\$\$\$.”), 68 (describing the motive behind his hiring an employee who formerly worked in county government: “The Machiavelli concept. Divide and conquer. No one else in the transportation department has any idea what

they're doing. They will no be 100% depending on me.”), 97 (referring to a public official who opposed Brega's seeking a significant change order in the form of charges for bus washing: “He thinks he has more influence than me. We will see.”), 3–4 (referring to a public official with whom Brega had disagreed: “F him”), 28–29 (referring to a public official who was not agreeable to Brega: “Help him understand his options are going to be limited without a friend in the near future ... Be careful”), 57 (referring to another public official: “Fuck him”), 60–61 (referring to a public official who, according to Brega, “got screwed in the legislature because of me”: “Fuck her”), 70 (referring to public officials with whom he anticipated negotiating: “I must destroy them”).

In addition to the fraud, bribery, and obstruction of justice before this Court, Brega also faces sentencing in state court in Rockland County for falsifying business records, by bundling campaign contributions from his employees and others for the benefit of a public official and candidate for office. (PSR ¶ 65).<sup>34</sup> Previously, Brega provided tens of thousands of dollars of undisclosed payments to yet another public official, which the official did not disclose in ethics filings. *See* “Gromack didn't report side work for Brega on Rockland ethics filings,” *The Journal News*, September 28, 2015.<sup>35</sup> The payments were for purported consulting work, for which the public official was paid an ongoing commission by Brega DOT. The commissions were not disclosed to either the public—that is, the official's constituents—or the Brega customers who were unwittingly paying “consulting fees” to the official. Once the secret arrangement was detected, Brega rearranged the “consulting” payments so that they would instead be made to the

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<sup>34</sup> The state has agreed that Brega's sentence should run concurrently with the sentence imposed by this Court. Accordingly, this Court should sentence Brega as well for the conduct before the state, in order to ensure that Brega is adequately punished for all his crimes.

<sup>35</sup> <https://www.lohud.com/story/news/local/rockland/clarkstown/2015/09/28/gromack-brega-rockland-ethics/72968170/>.

official's wife, whom Brega had hired. In addition, Brega systematically overcharged Rockland BOCES for parts for years. (Tr. 231, 319.)<sup>36</sup>

Moreover, the glowing letters of support Brega includes with his sentencing submission cannot all be accepted at face value. Following the filing of Brega's sentencing submission, the Government investigated tips regarding two of the letters. Both letters were purportedly from individuals who, at the time of the writing, were employees of the Brega entities, but who had recently left Brega to work elsewhere. In each instance, the letter writer told the Government that the letter submitted to the Court is *not* the letter the author signed, and the letter submitted to the Court includes sentiments with which the author does *not* agree. In one instance, the letter includes a paragraph calling Brega "the most amazing person I have ever encountered," and "a gift from God." But the author denies signing any such letter with those sentiments, and does not agree with them. In the other instance, the letter includes disparagement of the victim in this case, Rockland BOCES ("the shenanigans that go on over there is unbelievable"), and the cooperating witness, Popkave ("It is William Popkave who's character is truly in serious question. Not Richard Brega, that I can assure you!"). The author denies signing a letter with these sentiments, does not agree with them, and further remembers telling Brega's brother not to include any such sentiments in the letter.<sup>37</sup>

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<sup>36</sup> Brega notes that he met with the Government in a proffer session after trial. Yet, even by Brega's own account at the unsuccessful proffer session, he engaged in other frauds, including fraudulently marking up parts for a both Rockland BOCES and another customer, even generating false invoices to "justify" the improper mark-ups for the other customer.

<sup>37</sup> The Government has no reason to believe that Brega's counsel—who is known to be up-front and ethical in all his dealings with the Government and the Court—had any role in the creation of false or misleading letters to the Court.

The Government is unaware the extent to which the remaining letters, some of which include passages not unlike those that authors have openly disclaimed, also include fabricated, ghost-written, or just plain misleading material. It is noteworthy though, that included among the letters are sentiments from other Brega employees, whose letters characterize Brega's mere employment of them as a charitable and/or life-altering event; a letter from an individual who testified falsely under oath at the trial in this case that he personally saw BOCES buses at the Brega facility every Saturday (Tr. 811); and from another Brega employee, who previously lied for Brega by serving as a straw donor to a local politician, and thereafter initially lied to the Government about having done so.

In short, Brega's character is defined by a selfish, power-hungry, destructive ambition. Brega was willing to bribe public official, steal from a school district, cover up that conduct, and engage in all manner of other deceptive conduct in order to aggrandize himself and his businesses. The fraud and bribery scheme of which he was convicted, for which he now faces sentence, is not anomalous; it simply reveals who Brega actually is.

#### IV. Conclusion

For the reasons set forth above, this Court should sentence Brega to a very significant term of imprisonment. Such a sentence would be sufficient, but not greater than necessary, to accomplish the goals set forth in 18 U.S.C. § 3553(a).

Dated: White Plains, New York  
December 3, 2018

Respectfully submitted,

GEOFFREY S. BERMAN  
United States Attorney

By: /s/ Michael D. Maimin  
Benjamin R. Allee  
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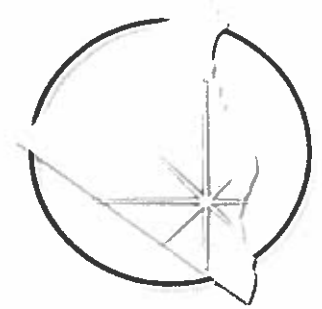
# ROCKLAND BOCES

BOARD OF COOPERATIVE EDUCATIONAL SERVICES

**DAVID C. GLEASON**

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November 30, 2018

Honorable Kenneth M. Karas  
United States District Judge  
United States Courthouse  
300 Quarropas Street  
White Plains, New York 10601

Re: Richard Brega

Honorable Judge Karas:

On behalf of the Rockland Board of Cooperative Educational Services, I am writing to you as you move to impose sentence on Richard Brega for the criminal activities that he was found guilty of by a jury of his peers.

Rockland Board of Cooperative Educational Services (BOCES) is an educational entity created by the New York State Legislature to allow multiple school districts to pool resources and thereby provide an educational setting that addresses the needs of their students in ways that individual school districts could not do on their own. For Rockland BOCES, we are comprised of the eight public school districts located in Rockland County. We provide many services to the eight component districts with one of the leading programs being the offerings of the Student Services Division, which is responsible for programs that benefit special need students. The Student Services Division has created and implemented instructional strategies designed to educate the whole child. Our trained staff, utilizing a team approach, educates students with physical, educational, emotional, social, learning and/or behavior challenges, by providing a wide range of programs and services, including academic instruction, social interventions and extensive community support. Many of our students are profoundly handicapped.

Working in cooperation with our eight component school districts as well as other school districts throughout the Lower Hudson area, parents, involved professionals and support agencies, the Rockland BOCES Student Services Division offers assistance to classified (special need) students. The education of the whole child is paramount to our full service school model. We are a vital educational entity in our community, we embrace the diverse needs of our children and their families, and we provide them with a clear path to academic excellence. Our students struggle with disabilities across many spectrums. They are dealing with physical challenges, mental challenges, verbal and non-verbal challenges, and yet are working hard to gain an education.

The mission of Rockland BOCES is not limited to the classroom. The day for many of our students begins early in the morning as they and their families wait for the bus to come to their door to pick them up and deliver them to their school. Currently, we have a fleet of 48 buses and vans driven by 55 drivers escorted by 50 bus monitors and 20 one-to-one aides assigned to individual handicapped students, who travel the roads of Rockland County to transport our students. Many of our buses are wheelchair accessible as we have students who depend on their wheelchairs to be able to be mobile, both on the bus and within their school. The students and their parents or guardians, as well as the component schools that we serve, depend on Rockland BOCES to provide a safe means of bus transportation for them as they travel to and from school. The bus, the driver, and the monitor or aide are the first BOCES representatives that they see in the morning and the last that they see at the end of the day. The parents or guardians rightfully have a high expectation of the transportation service. Parents of special need students understand the perils of the road and the requirements of their children being transported in a safe and well maintained vehicle, and they depend upon Rockland BOCES to fulfill this expectation on a daily basis. Rockland BOCES as an agency would never knowingly put any child in harm's way which makes the misconduct engaged in by Mr. Brega that much more heinous.

The administration of Rockland BOCES began to have serious concerns about the maintenance of the transportation fleet in the late summer and early fall of 2015. Information was disclosed to us that was troubling and caused the administration to ask a third party to inspect our vehicles. The third party inspection of a small sample of our fleet left me speechless, since the report was very troubling. I went to the inspection site to see first-hand what the inspectors in the garage were finding. As I testified in court, I saw brakes that were metal-on-metal, undercarriages that were rusted to the point where there was the need to remove whole sections of the bus, oil in the engine blocks that supposedly had very recently been changed and was clearly not new oil, tie rods that were incorrectly installed; all of which should have resulted in a NO pass for these vehicles. The buses in question needed to be immediately repaired before they could be returned to the road. I asked the garage manager if he had taken pictures of what had

been encountered and when he replied that he did, I asked him to forward the pictures to me. In turn, I shared the pictures with the Rockland County District Attorney. Ultimately, all of the vehicles in the fleet needed to be taken out of service to be inspected and repaired which resulted in the need for Rockland BOCES to rent third-party buses to cover the depletion of the fleet, and for Rockland BOCES to purchase new vehicles to replace those buses that either were beyond repair or would not be able to "pass" the DOT inspection. In effect, through the actions of Mr. Brega and Mr. Popkave and their scheme to neglect the proper maintenance of our bus fleet, Rockland BOCES was ultimately forced to replace every vehicle so that we could meet the expectations of the students and their parents or guardians in that we would provide a safe and well maintained vehicle to transport them to and from school.

It has been stated that there were no accidents and no one was injured as a result of the scheme perpetuated by Mr. Brega. Merely because no child was injured does not mean that Mr. Brega should not be held fully accountable for his wrongdoing. His misconduct created a very dangerous situation where one or more students could have been injured or killed and the fact that good fortune intervened does not excuse what he did.

Neither the very medically fragile children who are entrusted to BOCES, nor their parents/guardians, could ever understand why the yellow bus that comes to their front door to transport them to and from school was potentially a disaster waiting to happen.

This criminal scheme in which Mr. Brega engaged is remarkable for just how brazen it actually was. He not only acted to defraud Rockland BOCES in order to seek financial gain but in so doing he knowingly put in harm's way the most precious resource that any of us have, our children.

Your Honor, on behalf of Rockland BOCES, I ask that you strongly consider not what did not happen but rather the risk and peril faced by the students we serve.

This crime of pure greed and avarice, which put children at risk, and which cost taxpayer dollars in the amount of \$206,515.33, willingly perpetrated by Mr. Brega for financial gain must be punished to the maximum permitted.

Respectfully submitted for your consideration on behalf of all the children who attend our programs and depend upon the BOCES Transportation Department to deliver them to school and back to their homes every day.

Thank you,



David Gleason  
Assistant Superintendent for Business and Operation



# Extraction Report

SIM Card SIM

## Participants

William;"Billy" Popkave + [REDACTED]  
Rich Brega + [REDACTED]

+ [REDACTED] William;"Billy" Popkave

5/16/2013 4:23:05 PM(UTC-4)

[REDACTED] . I think there is a  
future for you in town or county business in a political position. I did give my permission for a wayne supporter sign to be put  
up on my yard.

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x804C5D (Table: message, chat, Size: 10006528 bytes)

+ [REDACTED] Rich Brega

5/16/2013 4:28:48 PM(UTC-4)

No plans for me to be a Politician, I like being the guy who tells them what to do. I am the puppeteer

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x804E9F (Table: message, handle, chat, Size: 10006528 bytes)

+ [REDACTED] Rich Brega

5/22/2013 9:27:28 PM(UTC-4)

Vanderhoef told me tonight he signed the resolution and we are done it's time to start all working together and get this thing going

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x126E55 (Table: message, handle, chat, Size: 10006528 bytes)

+ [REDACTED] William,"Billy" Popkave

5/22/2013 9:31:00 PM(UTC-4)

Wow, that's great. Did he say anything about the hell he put you through.

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x126BD5 (Table: message, chat, Size: 10006528 bytes)

[REDACTED] Rich Brega

5/22/2013 9:31:44 PM(UTC-4)

Of course. Not

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1269CB (Table: message, handle, chat, Size: 10006528 bytes)

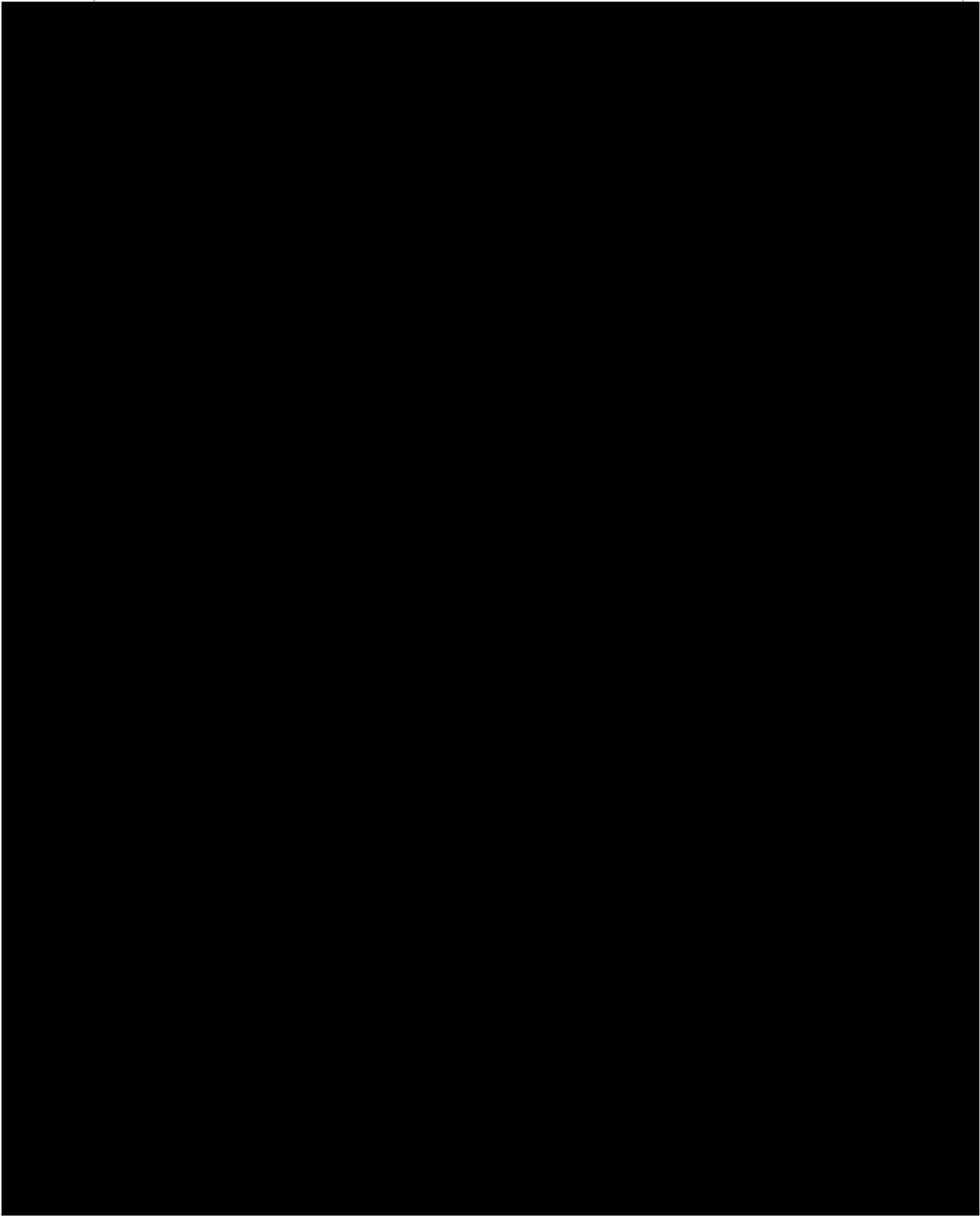
Rich Brega

5/22/2013 9:31:44 PM(UTC-4)

F him

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x12683C (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] William,"Billy" Popkave

9/18/2013 8:12:22 PM(UTC-4)

At a board meeting. Ron told me that he has been out of the office a lot and that he would talk to me on the morning

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1ACFF8 (Table: message, chat, Size: 10006528 bytes)

+ [REDACTED] William,"Billy" Popkave

9/18/2013 8:13:35 PM(UTC-4)

Are you around later or are you home

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x57EAC9 (Table: message, chat, Size: 10006528 bytes)

+ [REDACTED] William,"Billy" Popkave

9/18/2013 8:14:44 PM(UTC-4)

Ok I thought I would try take you out to eat

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x57EE1D (Table: message, chat, Size: 10006528 bytes)

+ [REDACTED] Rich Brega

9/18/2013 8:14 56 PM(UTC-4)

I'm home

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x57EC4E (Table: message, handle, chat, Size: 10006528 bytes)

- [REDACTED] Rich Brega

9/18/2013 8:14 56 PM(UTC-4)

He is not getting the message. He is not listening

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x57EFF8 (Table: message, handle, chat, Size: 10006528 bytes)

- [REDACTED] Rich Brega

9/18/2013 8:17 04 PM(UTC-4)

Maybe we can eat Tuesday after the legislature

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1ADFF8 (Table: message, handle, chat, Size: 10006528 bytes)

+ [REDACTED] William,"Billy" Popkave

9/18/2013 8:17:24 PM(UTC-4)

Explain more to me in detail. Yes we will go after legislature meeting

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1ADE27 (Table: message, chat, Size: 10006528 bytes)

- [REDACTED] Rich Brega

9/18/2013 8:21:20 PM(UTC-4)

He could push to get me paid. Instead he forwards me info in the contract. He has the ability, but isn't willing to do the hard work

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1ADC23 (Table: message, handle, chat, Size: 10006528 bytes)

+ [REDACTED] William,"Billy" Popkave

9/18/2013 8:32:25 PM(UTC-4)

I will have a good business conversation with him and feel him out.

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1AD9A1 (Table: message, chat, Size: 10006528 bytes)

- [REDACTED] Rich Brega

9/18/2013 8:38:24 PM(UTC-4)

Help him understand his options are going to be limited without a friend in the near future

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1AD7A3 (Table: message, handle, chat, Size: 10006528 bytes)

 Rich Brega

9/18/2013 8:38:24 PM(UTC-4)

Be careful

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1AD575 (Table: message, handle, chat, Size: 10006528 bytes)

 William,"Billy" Popkave

9/18/2013 8:39:33 PM(UTC-4)

Ok, my guard will be up

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1AD24B (Table: message, chat, Size: 10006528 bytes)

 Rich Brega

9/18/2013 8:40:32 PM(UTC-4)

Don't totally trust him

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x1AD3EC (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] William,"Billy" Popkave

12/27/2013 8:15:01 PM(UTC-5)



I am worried for Uncle Peter if a private firm comes  
In at a lower price than me. Their business office thinks what they want can be done with less staff and using their current  
software. Phil Scala is not on my side.

Source Extraction: Logical (4), Logical (3)  
Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x23B66D (Table: message, chat, Size: 10006528 bytes)



+ [REDACTED] William,"Billy" Popkave

12/27/2013 8:16:28 PM(UTC-5)



He is kind of a know it all bully

Source Extraction: Logical (4), Logical (3)  
Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x23CFF8 (Table: message, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

12/27/2013 8:16:48 PM(UTC-5)

Fuck him

Source Extraction: Logical (4), Logical (3)  
Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x23B33F (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

12/27/2013 8:16:48 PM(UTC-5)

You nailed it

Source Extraction: Logical (4), Logical (3)  
Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x23CE3F (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] William,"Billy" Popkave

1/1/2014 6:10:23 PM(UTC-5)



On another note while I was leaving the Fire Traing center today, Harriet stopped me and asked me if I am working for Brega yet

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x249417 (Table: message, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

1/1/2014 6:10 56 PM(UTC-5)

Lol

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x2491A5 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

1/1/2014 6:10 56 PM(UTC-5)

She got screwed in the legislature because of me

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24AE31 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

1/1/2014 6:10 56 PM(UTC-5)

She is pissed

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24AC5E (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] William,"Billy" Popkave

1/1/2014 6:11:13 PM(UTC-5)



Clear me up on the changing of direction

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24AFF8 (Table: message, chat, Size: 10006528 bytes)



[REDACTED] William,"Billy" Popkave

1/1/2014 6:12:34 PM(UTC-5)



Oh?!!!!

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24AAD1 (Table: message, chat, Size: 10006528 bytes)



[REDACTED] William,"Billy" Popkave

1/1/2014 6:16:17 PM(UTC-5)



My answer to her is that as I support Richard Brega, I can not retire yet, unless there is an early incentive to come out. Very possible if the NYS Local Retirement System wants to get rid of high salaries in Tier 4.

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24A950 (Table: message, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

1/1/2014 6:17:20 PM(UTC-5)

Ok

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24A624 (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

1/1/2014 6:17:20 PM(UTC-5)

Fuck her

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24A4AD (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

1/2/2014 10:52:32 PM(UTC-5)

<http://www.rocklandtimes.com/2014/01/02/brega-phone-app-to-revolutionize-bus-waiting-experience/>

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x24F4C7 (Table: message, handle, chat, Size: 10006528 bytes)



+ [REDACTED] Rich Brega

1/2/2014 10:52:32 PM(UTC-5)

What till they all get addicted to it, then I'm going to charge everyone to have access to it. Lol, I will make a Gazillion \$\$\$\$

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x250FF8 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

2/6/2014 3:41:36 PM(UTC-5)

I agree. He also wants to tell you I hired his son Vinny Jr. He starts March 3rd

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x28ADD8 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] William,"Billy" Popkave

2/6/2014 3:50:16 PM(UTC-5)



Wow wow !!!!! Keep surrounding yourself with good heads/people. You are my idol!!!!!!!

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x28AFF8 (Table: message, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

2/6/2014 3:52:16 PM(UTC-5)

The Machiavelli concept, Divide and conquer. No one else in the transportation department has any idea what they're doing. They will now be 100% depending on me

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x4E6B0B (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

2/6/2014 3:52:16 PM(UTC-5)

Lol!!!

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x4E6C8A (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

2/6/2014 3:52:16 PM(UTC-5)

Now let's see Senior fuck with me

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x4E6E3F (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

2/6/2014 3:54:24 PM(UTC-5)

Wait to Leopoldo gets wind of this. He's going to have a stroke

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x28B367 (Table: message, handle, chat, Size: 10006528 bytes)



William, "Billy" Popkave

2/7/2014 7:36:11 PM(UTC-5)



Do you know or have any idea of the wish and wants ?

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x4F7E53 (Table: message, chat, Size: 10006528 bytes)



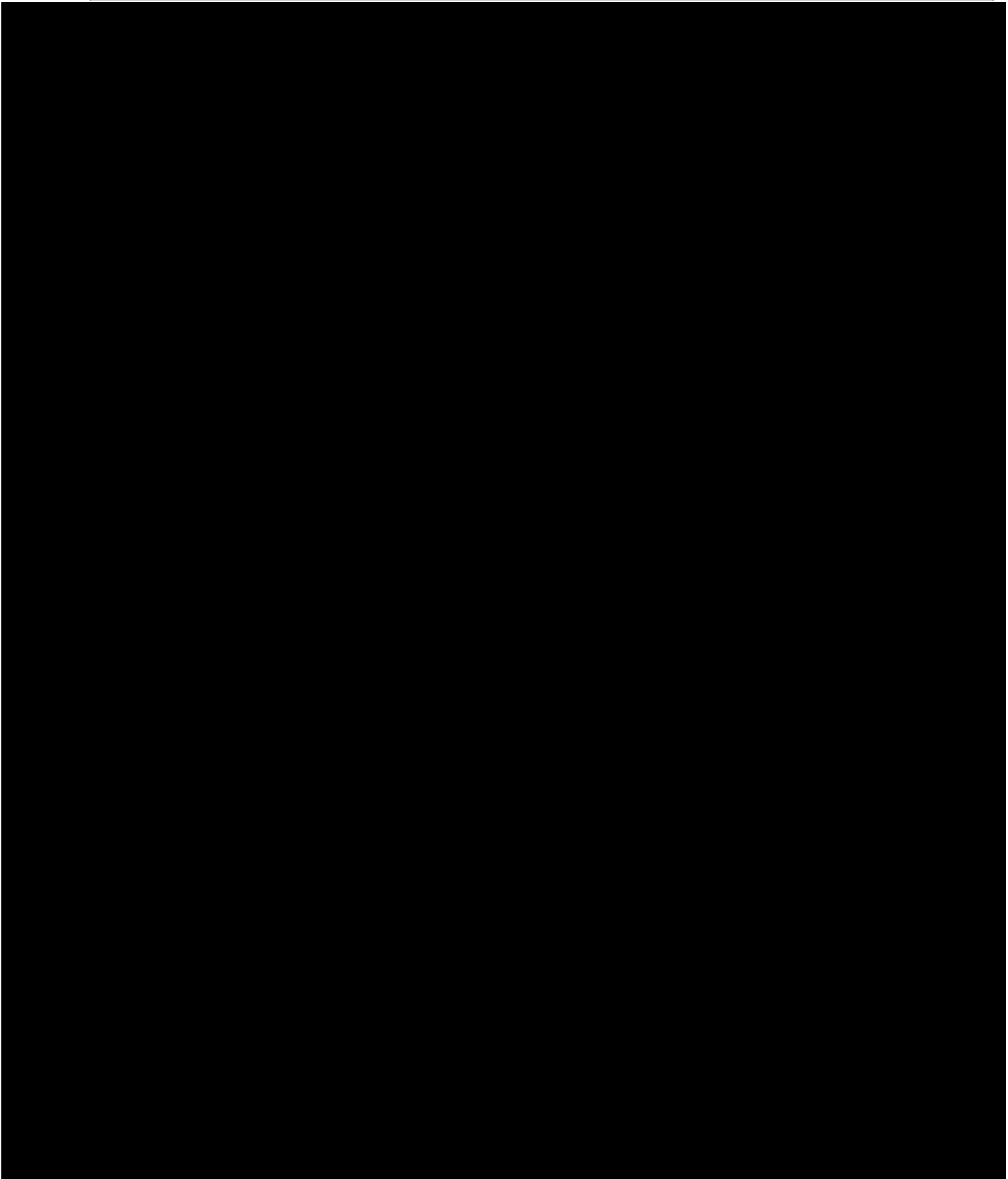
Rich Brega

2/7/2014 7:38:24 PM(UTC-5)

Yes. I must destroy them

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x4F7FF8 (Table: message, handle, chat, Size: 10006528 bytes)





[REDACTED] Rich Brega

6/25/2014 10:31:28 PM(UTC-4)

Yes. He said no to bus washing, so I got the Legislature to say yes. He is pissed!!!

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x373BD7 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

6/25/2014 10:31:28 PM(UTC-4)

Now he is out to get me

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x3739B1 (Table: message, handle, chat, Size: 10006528 bytes)



[REDACTED] Rich Brega

6/25/2014 10:31:28 PM(UTC-4)

He thinks he has more influence than me. We will see

Source Extraction: Logical (4), Logical (3)

Source file: bpopkave's iPhone/var/mobile/Library/SMS/sms.db : 0x373810 (Table: message, handle, chat, Size: 10006528 bytes)